Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-58

W. DALTON LA RUE, SR.,

and

JUANITA S. LA RUE, *Petitioners,*

vs.

UNITED STATES OF AMERICA, ROGERS C. B. MORTON, Secretary of Interior, E. I. ROWLAND, State Director of Bureau of Land Management, and MARSHALL MATLEY, CLIFFORD MATLEY, JOHN MATLEY and WAYNE MATLEY, d.b.a. M. S. LAND & LIVESTOCK CO., a Co-Partnership, *Respondents.*

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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OPINIONS BELOW

The opinion of the Interior Board of Land Appeals (IBLA) was decided on January 30, 1973, and

is reported at 9 IBLA 208 and appears at pages 106-113 of the Record on Appeal, Volume I, to the 9th Circuit Court of Appeals. The decision of the District Manager (December 24, 1969) appears at pages vi-vii of Appendix B. The decision of the Hearing Examiner (October 28, 1971) appears at pages viii-xxii of Appendix B. Both of these decisions appear in the administrative record which was before the 9th Circuit Court of Appeals. The IBLA opinion appears in Appendix B hereto, pages xxiii-xxxv. The Findings of Fact, Conclusions of Law and Judgment of the District Court appear on pages 209-211 of the Record on Appeal, Volume I and in Appendix B hereto, pages xxxvi-xxxviii.

The opinion of the Court of Appeals is unreported and appears in Appendix B hereto, pages xl-xli. The Denial of Petition for Rehearing of the 9th Circuit Court of Appeals is unreported and appears in Appendix B hereto, page xlii.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 2, 1976, and the Judgment of the same court denying a petition for rehearing was entered on April 21, 1976.

QUESTIONS PRESENTED

1. Can a governmental agency, the Department of Interior Bureau of Land Management, sanction the commission of fraud by one grazing licensee upon

another on the grounds that the results of the fraud may be justified under agency discretion?

2. Can the commission of fraud by a grazing licensee be dismissed by the Bureau of Land Management as not of controlling importance?

3. Can the Department of Interior allow and condone collusion by a BLM official who aided and abetted in the commission of a fraud?

4. Is the Adjudication of Appellants' Grazing Privileges of May 17, 1967, binding upon the Bureau of Land Management Department of Interior (hereinafter BLM) until such time as the BLM follows proper procedures for changing that adjudication?

5. Did the 9th Circuit Court of Appeals commit error by affirming the District Court which held that Appellants were only entitled to a limited review of the administrative proceedings rather than to a trial de novo?

A. Are Appellants entitled to a trial de novo in District Court if the Interior Board of Land Appeals decision is unwarranted by the facts?

B. Are Appellants entitled to trial de novo if legal issues are involved and if the IBLA decided the legal issues incorrectly?

6. If Appellants are not entitled to a trial de novo, did the 9th Circuit Court of Appeals commit error by affirming the District Court which held that the IBLA decision was not arbitrary, capricious, an abuse of discretion and did not commit any errors of Law?

A. Was the IBLA approach to the issues involved arbitrary and capricious?

B. Did the IBLA commit legal error in holding that the Defendant Matleys did not commit fraud and misrepresentation on Elmor Hill, Appellants' predecessor?

C. Was the IBLA decision arbitrary and capricious and in legal error in its conclusions that the fence line agreement of Respondents Matleys and Elmor Hill, Appellants' predecessor, was not invalid?

D. Did the IBLA improperly ignore United States Code Title 18, Section 1001, and United States Code Title 18, Section 2, and thus commit an abuse of discretion?

E. Did the IBLA improperly apply the Federal Range Code, thus committing errors of Law?

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are the various provisions of the Taylor Grazing Act, 48 Stat. 1269, as amended, 43 U.S.C. Sec. 315, et seq. and related land laws and the United States Criminal Code, 18 U.S.C. 1001 and 18 U.S.C. 2 and 5 U.S.C. 706, pertaining to scope of review, and 28 U.S.C. 1346(b) and 28 U.S.C. 2680(h). Their pertinent text is set forth in Appendix A, infra.

STATEMENT OF THE CASE

This case involves the location of a stock fence. The location of the fence was determined by a fraudulent contract. Portions of the fence were constructed on federal grazing land and portions were constructed on private land. One of the ranches is the Winnemucca Ranch which belongs to Appellants. The other ranch is the Paiute Ranch which belongs to Respondents Matleys. Appellants are W. Dalton La Rue, Sr. and Juanita S. La Rue, dba Winnemucca Ranch, and Respondents are United States of America, Rogers C. B. Morton and E. I. Rowland in their respective official capacities as Secretary of the Interior and Nevada State Director, Bureau of Land Management, and Marshall Matley, Clifford Matley, John Matley and Wayne Matley, dba "M.S. Land and Livestock Co."

Course of Proceedings:

Appellants sought judicial review of a decision of the Interior Board of Land Appeals denying Appellants' request for relocation of the stock fence in question. In addition, Appellants sought an order directing the relocation of the fence, and they requested an award in damages against the United States as compensation for alleged injury resulting from their reliance upon information furnished by a District Manager of the Bureau of Land Management, and for refusing to comply with Appellants' adjudication pursuant to 43 C.F.R. 4111.3-2(e).

Respondents moved for a summary judgment on the grounds generally that the District Court did not

have jurisdiction and that the IBLA decision was not arbitrary, capricious, and an abuse of discretion and did not commit any errors of law. Further Respondents stated that the claim for monetary damages was barred by 28 U.S.C. Sec. 2680(h).

Disposition in the Courts Below:

The District Court held basically that it did have jurisdiction of the matter but that Appellants were entitled only to a limited review of the administrative proceedings. The District Court held after reviewing the administrative proceedings that the IBLA decision was not arbitrary, capricious and an abuse of discretion and did not commit any errors of law. Further, the court held that Appellants' claim for monetary damages was barred by 28 U.S.C. Sec. 2680 (h). On those grounds the Summary Judgment was granted and Appellants were denied the relief sought.

STATEMENT OF FACTS

Appellants, W. Dalton La Rue, Sr. and Juanita S. La Rue, dba Winnemucca Ranch, in this case will be referred to as "Appellants" since that is how they are referred to in the IBLA decision.

Respondents, United States of America, Rogers C. B. Morton and E. I. Rowland will be referred to as "The Bureau of Land Management" (hereinafter, BLM) since those respondents are involved because of the administrative agency of the BLM.

Respondents Marshall Matley, Clifford Matley, John Matley and Wayne Matley, dba "M. S. Land and Livestock Company", will be referred to as Respondents Matleys. However, it should be noted that they are referred to as Intervenors in the decision of the IBLA. However, they are referred to as "Matleys" on many of the documents which are referred to herein.

As is stated above, this case involves the location of a stock fence labeled as the Winnemucca Valley division fence. The Appellants are the present owners of the Winnemucca Ranch and the appurtenant Winnemucca Ranch grazing allotment. The fence in question was constructed when the Winnemucca Ranch was owned by Appellants' predecessor, Elmor Hill. The Respondents Matleys have been the owners of the Paiute Canyon Ranch at all relevant times. (Transcript of Hearing Examiner (hereinafter T-HE) 9 IBLA 209).

Generally, Appellants' position is that this fence should be relocated to the adjudicated boundary of May 21, 1967. In order to understand Appellants' position and arguments, it is necessary to review the background of the ownership of the ranches in question, the background of the construction of the fence, the background of the relevant fence line agreements, and the Winnemucca Ranch adjudication of May 21, 1967.

Prior to 1949 the Respondents Matleys (dba M. S. Land and Livestock Company) controlled a large area which included the Winnemucca Ranch, as well

as other ranches. In 1949 the Matleys sold the Winnemucca Ranch and another ranch (known as the Milk Ranch) with their appurtenant privileges to a Mr. Gilbert while retaining yet another ranch identified as the Home Ranch. (T-HE, pp. 64, 65).

In 1952 a controversy arose when the Matleys applied to the BLM for Federal grazing privileges in the amount of 1400 Animal Units per Month[1] (hereinafter AUM's) in the area of use of the Winnemucca Ranch based upon their ownership of the Home Ranch. Gilbert, as purchaser of the Winnemucca and Milk Ranches, and the Browne Cattle Company, as Gilbert's grantee, asserted a right to the same grazing privileges. (T-HE, p. 65).

By a decision of May 28, 1954, a Hearing Examiner affirmed a decision of the District Manager, Dante Solari, Nevada Grazing District No. 3, rejecting the Matleys' application for the 1400 AUM's based on ownership of the Home Ranch upon a finding that the Home Ranch had lost its qualification as Class 1 base property by virtue of the failure of the Matleys, over a period of more than 2½ years prior to the date of their application, to apply for grazing privileges based upon ownership of the Home Ranch. (Decision of Hearing Examiner Dalby dated May 28, 1954).

The Hearing Examiner's decision of May 28, 1954, was affirmed by the Director, Bureau of Land Management on January 17, 1957, and the Matleys' subsequent appeal to the Secretary of the Interior was dismissed on procedural grounds on May 28, 1957. Thus, the Matleys were permanently denied ownership of these 1400 AUM's. (IBLA decision, 9 IBLA 212; also Matley Brothers, et al. A-27486 (May 28, 1957)).

[1]An AUM or Animal Unit Month is a grazing right for one month of feed for one cow.

At some time subsequent to the controversy between the Matleys and Gilbert and Browne, ownership of the Winnemucca Ranch passed to Elmor Hill, doing business as the Horseshoe Cattle Company. (9 IBLA 209).

On August 25, 1958, Respondents Matleys and Elmor Hill entered into a cooperative agreement pursuant to Section 4 of the Taylor Grazing Act, 43 U.S.C. 315(c), for the construction of a "Winnemucca Valley Division Fence". Prior to this agreement and the erection of the fence in question, cattle were permitted to drift back and forth between the areas of use of the Winnemucca Ranch and Paiute Ranch.[2] This drift of cattle occurred irrespective of the natural boundaries of the Tule and Paiute Ridges and a drift fence. The construction of the Winnemucca Valley Division fence was based on the contract by which Hill believed he would receive 1400 AUM's of grazing rights, which he believed Matley owned. The fence would not only eliminate a drift of cattle, but the fence would also eliminate the running in common of cattle to the extent of 1400 AUM's. Thus,

[2]The area of use, the number of AUM's assigned to a ranch, and the amount of forage produced on the deeded acres (base property) of the ranch are based on the base period history for the years 1929-1934 of the actual ranch operation.

to resolve the problems inherent where a drift of cattle occur and to eliminate an in common area of use, and in exchange for 1400 AUM's, Hill agreed to give up a certain portion of his area of use and to erect the fence at its present location. However, although the fence was erected, and although Matleys received a portion of Hill's area of use, Hill received nothing. The AUM's which Matley offered Hill were nonexistent. Thus, as a result of the construction of the fence in question, a portion of the Winnemucca area of use was cut off from the Winnemucca Ranch and made accessible to the Paiute Canyon Ranch with no consideration going to the Winnemucca Ranch.

The fence was constructed between September 1, 1958, and May 1, 1959, and the construction was accepted as satisfactory by Marshall Matley and by Elmor Hill by letters of May 7 and May 18, 1959 respectively. (9 IBLA 209; Letters from BLM to Matleys and Hill; Letter from Hill to BLM and Matleys to BLM.)

As is stated above, this fence was constructed pursuant to a cooperative fence line agreement. However, Hill and the Matleys also signed an "Application for Transfer of Grazing Privileges Land Base" pursuant to 43 C.F.R. 161.7 (b) and a part thereof was an undated agreement which was entered into for the purposes of setting out the terms by which the fence was to be located and the consideration received by each side. By the terms of the "Application for Transfer" and the attached undated agreement, the Matleys purported to "transfer all of the privileges of the Home

Ranch or Glendale Ranch to the Winnemucca and Milk Ranches now belonging to Elmor Hill or the Horseshoe Cattle Company." Such privileges were described as "1400 AUM's used with 300 cattle in the Fort Sage, Vinegar Mt. and Tule Mt. Area," and, according to the agreement, the transfer was made "to dissolve all past range controversies" and was "subject to the fence line agreements recently made between the parties". ("Application for Transfer of Grazing Privileges Land Base", signed August 9, 1958, and filed August 18, 1958, and "Agreement", undated). In other words, in exchange for putting the fence on the line where it is now located, a line which deprives the Winnemucca Ranch from access to a portion of its 1967 adjudicated allotment, Respondents Matleys agreed to transfer 1400 AUM's to Elmor Hill. However, this 1400 AUM's which the Matleys were going to transfer were the same 1400 AUM's which the Matleys had earlier been permanently denied by the BLM. The Matleys had unsuccessfully applied to the BLM for these 1400 AUM's as is set out above. Nevertheless, the Matleys agreed to transfer these 1400 AUM's to Elmor Hill as consideration for the fence line. (9 IBLA 213).

By the "Application for Transfer of Grazing Privileges", dated August 9, 1958, the Matley Brothers requested the BLM to transfer to Elmor Hill (Horseshoe Cattle Company) the grazing privileges described in the undated instrument of transfer (signed by Hill and Matleys), which was attached to the "Application for Transfer". ("Application for Transfer of Grazing

Priveleges Land Base", signed August 9, 1958, and filed August 18, 1958, and "Agreement", undated).

Importantly, the Matley Application for Transfer was accepted by Dante Solari, District Manager of the BLM, who had earlier made the original decision denying the Matleys ownership of these same 1400 AUM's. *Thus, the Application for Transfer was accepted by a BLM official who knew that the 1400 AUM's were unavailable for transfer by the Matleys.*

Further, it is the duty of the District Manager to approve all grazing permits. It is stated in 43 C.F.R. 4111.3-2 (2) (b) as follows:

> Permits, annual licenses. Grazing permits may be issued as soon as the necessary data can be obtained or after agreements as to the extent of their individual grazing privileges have been reached by the interested applicants and such agreements have been reduced to writing; a recommendation thereon made by the advisory board, *and approval thereof given by the District Manager.* (Emphasis added).

As a result of this duty of the District Manager to approve grazing permits, a District Manager is aware of the number of AUM's and area of use available to a licensee. Consquently, in the present case Dante Solari knew that the Matleys did not have the 1400 AUM's which they attempted to transfer to Elmor Hill and were not entitled to the additional area of use.

Also, a District Manager's obligations include rateing and classifying each area of use as to its grazing capacity. 43 C.F.R. 4111.3-1 (a) states as follows:

> (a) Grazing capacity: Seasons and maximum annual period of use. The District Manager, after recommendation by the advisory board, will rate the grazing capacity of each unit or area in a grazing district and will classify each for the proper seasons of use and for the maximum period of time for which any licensee or permittee will be allowed to use the Federal range therein during any one year.

Dante Solari thus was aware of the amount of AUM's available to the Paiute Ranch and to the Winnemucca Ranch. Also, he was aware that the fence in question was constructed pursuant to the Application for Transfer of the non-existent AUM's. However, he accepted the Application for Transfer of 1400 AUM's which the Matley's did not have, and he failed to make any changes in his ratings of the two grazing units in the area. The areas of use remained the same before the fence was erected as after as well as the fee schedule.

Furthermore, Elmor Hill's attorney for that time, William Forman, transmitted the Application for Transfer document to Dante Solari, BLM District Manager. The transmittal letter to Dante Solari stated as follows: "If there are any questions or any defects in this transfer, will you please advise me." (Letter from W.J. Forman to Dante Solari, dated August 15, 1958). This letter was never answered.

Finally, on November 15, 1961, *over three years after the Matleys made their Application for Transfer* of the 1400 AUM's which they did not own *and one day after the death of Elmor Hill* (Death Certificate

of Elmor Hill), Dante Solari denied the transfer of the 1400 AUM's on the grounds that the Matleys did not own the AUM's which they attempted to transfer. ("Application for Transfer of Grazing Privileges Land Base" p. 2; T-HE p. 71).

Regarding the knowledge of the Respondents Matleys and Dante Solari as to the unavailability of the 1400 AUM's for transfer, the IBLA in its decision of 9 IBLA 213, concluded as follows:

> . . . *Moreover, there is no question that intervenor (Matleys), must have known* at the time of the 1958 cooperative agreement *that the consideration for that agreement, i.e., 1400 AUM's were not intervenor's to transfer.* Fifteen months before the fence cooperative agreement was signed the intervenor (Matleys) had lost any hope of being awarded the AUM's which it offered Hill-*Matley Brothers, et al.* *supra.* We also note that former BLM Range Manager (Dante Solari) who signed both the cooperative agreement and rejection of the transfer application should have known of the Department's decision holding that the intervenor (Matleys) had no right to the grazing privileges which it subsequently offered Hill. (Emphasis added).

On the "Application for Transfer of Grazing Privileges Land Base", signed on behalf of the Matley Brothers, it is stated as follows:

> . . . We certify . . . that I have the lawful right to make such transfer . . . I certify that the statements in this application are true, complete and correct to the best of my knowledge and belief, and are made in good faith . . .

> Title 18, USC, Sec. 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious or fraudulent statements or representations as to any matter within its jurisdiction.

Under these circumstances, the fence in question was constructed. Prior to the Hill-Matley fence agreement and erection of the resulting fence, the area of use boundary between th Winnemucca Ranch and the Paiute Ranch was a natural line established by metes and bounds, which is in large part, over one mile east of the present fence. The fence is situated so that it makes the accessible Winnemucca Ranch area of use smaller by 2,000 plus acres (259 AUM's) than said area of use existed prior to the erection of the fence. (T-HE p. 66-67; 172; 9 IBLA 209; Map. Ex. 10 before Hearing Examiner).

However, even after the construction of the fence in question, the metes and bounds description of the boundary of the Winnemucca Ranch area of use was not changed in the BLM records. The boundary of the Winnemucca Ranch area of use as reflected in the official BLM records remained the same after the fence was erected as before. (T-HE p. 138, 153).

In December of 1966 Appellants were considering acquiring the Winnemucca Ranch. The Appellants La Rues' did not acquire the Winnemucca Ranch in the normal sense of a purchase. The Appellants acquired the Winnemucca Ranch by an exchange of ranches in order to end nine years of litigation between them-

selves and the Department of the Interior, BLM and North American Aviation, Inc. In 1953 the Appellants acquired the Monte Cristo Ranch in Washoe County, Nevada and became the operators/owners of said ranch. In 1958 North American Aviation, Inc., now Rockwell International, Inc., became interested in the area for a site to test rocket engines. North American acquired all of the private land except the Appellants and through Section 8 transfers, attempted to acquire all government land in the area. The principal issue in the nine years of litigation was—could a Section 8 transfer of the Taylor Grazing Act be consummated which would eliminate all of the public domain on which a ranch could operate. In order to end said litigation and to have a litigation-free ranch, North American Aviation, Inc., acquired the Winnemucca, Milk and Olds Ranches also in Washoe County, Nevada and offered to exchange them to the La Rues' for their Monte Cristo Ranch in order to end said litigation and to obtain the deeded area of the Monte Cristo Ranch. The following is the litigation which was dropped because of the exchange: Private land exchanges, Sec. 8 of Taylor Grazing Act; Nev. 048452, Civ. Case No. 1696, U.S. District Court, Nevada decided August 16, 1965; Nev. No. 048847, 69 I.D. 120, 166 U.S. App. D.C. 369; 324 F. 2d 428 (1963) cert. denied 376 U.S. 907 (1964); Nev. No. 051126, objections withdrawn; Nevada Area Boundaries, Nev. Appeal Nos. 3-60-2, 3-60-1, 3-62-1, 3-63-1; Secretary's Decision A30, 391 (March 16, 1966) U.S. District Court, Nevada, Civ. Case No. 1860, Filed September 19, 1966; Show Cause Notices for Reduction of AUM's, Nev.

Appeal Nos. 3-64-1, 3-64-6, 3-67-1, Dismissed January 5 and 6, 1967. (T-HE pp. 138, 153).

However, instead of getting a litigation free ranch, the Appellants are in their seventh year of litigation and are petitioning for certiorari to the United States Supreme Court.

In considering acquiring the Winnemucca Ranch, Appellants went to the BLM office in Carson City to get a description of the federal grazing area of use which was appurtenant to the Winnemucca Ranch. After being given a description by District Manager, Val. P. Richmond, in the BLM office in Carson City, Appellants went out to the Ranch to verify the boundaries of the Winnemucca Ranch area of use and any fences constituting said boundaries. Because of the time of year (winter) and the heavy snowfall that year, Appellants were not now able to follow the area of use boundary on the Eastern side, the side which adjoins the Paiute Canyon area of use, which belongs to Respondents Matleys. (T-HE, pp. 139, 140 Exhibit 10 (Map)).

Although Appellants were not able to follow this Eastern boundary, Appellants were able to locate the natural boundary line on a BLM map by using the metes and bounds description furnished by the BLM. (In other words, Appellants were able to locate the described boundary by using the BLM area of use description, and by using BLM maps) (T-HE pp. 139, 140 Exhibit 10 (Map)).

After thus becoming satisfied that the boundary lines of the Winnemucca Ranch area of use were

in a proper place for management and development of the ranch and free of litigation, the Appellants acquired the Winnemucca Ranch on December 2, 1966 to settle nine years of litigation with North American Aviation and the BLM.

On January 28, 1967, Appellants applied on a "Long Form Application for Grazing or Permit". This application was granted by the BLM and the area of use boundaries set forth in this application are the same as those on the grazing licenses of prior owners and the same as was given to Appellants at the BLM office. ("Long Form Application for Grazing or Permit", signed by W. Dalton La Rue).

On the following May 16, 1967, Appellants were formally served with certain documents by the BLM. The documents were entitled as follows:

"NOTICE OF INITIAL ADVISORY BOARD RECOMMENDATION AND PROPOSED DECISION OF DISTRICT MANAGER ON ADJUDICATION OF GRAZING PRIVILEGES" and "RANGE LINE AGREEMENT"

(Emphasis added). (T-HE p. 141; "Notice of Initial Advisory Board Recommendation and Proposed Decision on Adjudication of Grazing Privileges", dated May 17, 1967, and "Range Line Agreement" attached thereto). This legally established the Winnemucca Ranch Allotment and its boundaries, which have never been rescinded.

These documents were signed by the Appellants and by the District Manager of the BLM, Val B. Richmond. These documents contained the same description of the Winnemucca Ranch allotment as the description which was given to Appellants by the BLM approximately five months earlier and the same description which was on the grazing license of Elmor Hill. (1958 Grazing License, T-HE p. 141). Thus, the description in these documents describes the boundaries of the Winnemucca Ranch allotment as extending farther on the eastern boundary than said allotment is allowed to extend because of the fence in question.

In June of 1967 when the snow had melted, Appellants discovered that a fence on the eastern side of the Winnemucca Ranch denied Appellants access to a certain portion of the Winnemucca allotment, the description of which was obtained before the Appellants acquired the Ranch. Further, this same allotment was described in their grazing license and in the Adjudication Documents which were signed by Appellants and the BLM. It must be emphasized that this was a legal adjudication pursuant to Title 43 C.F.R. 4111.3-2(c), the boundaries of that adjudicated allotment have never been changed. This fence also denied Appellants access to portions of their deeded land. (T-HE pp. 142-153).

All grazing licenses issued after erection of the fence and the adjudication papers served on the Appellants and the Range Line Agreements between Appellants and the BLM—all of these contained the description of the Winnemucca Ranch allotment as it existed before the fence in question was erected. Further, although the Winnemucca Ranch had less grazing land after the fence was erected and the Matleys more, the BLM grazing fee schedule remained the

same as before the fence was erected for both allotments. (T-HE p. 62; Bill to Horseshoe Cattle Company marked paid; T-HE pp. 83, 84, 132, 133).

By letter of March 7, 1969, Appellants advised the grazing District Manager of his discovery of a "discrepancy between the legally described boundary and the construction of the fence on the East side of the Winnemucca Ranch allotment." (Letter sent from Appellants to BLM, dated March 7, 1969). Appellants asserted in their letter that:

> The fence excludes us from approximately 350 deeded acres in Sections 17 and 18, T. 24N, R 20E known as the Olds Ranch and also goes through deeded acreage at Horse Springs in Section 32, T. 25N, Range 20E, and excludes us from allotted range land.

Upon this basis, Appellants requested that action be initiated to move the fence line to the adjudicated boundary. By a decision dated December 24, 1969, the District Manager, "reaffirmed" the fence line as presently located at the East Boundary of the Winnemucca Ranch allotment. It must be emphasized that the fence had never been affirmed as a boundary line. ("Notice of Final Advisory Board Adverse Recommendation and Decision of District Manager", from BLM to Appellants dated November 25, 1969).

On January 27, 1970, Appellants filed an appeal from the District Manager's decision of December 24, 1969 which resulted in an administrative hearing at Reno, Nevada on September 1 and 10, 1970 in which the Respondents Matleys also participated as an intervenor. ("Appeal from Final Advisory Board

Recommendation and Decision of the District Manager dated December 24, 1969").

By a decision of October 28, 1971, the Hearing Examiner dismissed Appellants' appeal, thereby sustaining the District Manager's determination. Appellants appealed from the Hearing Examiner's decision to the Interior Board of Land Appeals, which affirmed the Hearing Examiner's determination in a decision of January 30, 1973. ("W. Dalton La Rue, Sr., and Juanita S. La Rue, doing business as Winnemucca Ranch, Appellants vs. M.S. Land and Livestock Company, Intervenor; IBLA 72-179, Nevada 3-10-1).

Appellants filed a complaint in Federal District Court seeking review of the administrative proceedings and seeking monetary damages. (*W. Dalton La Rue, Sr., and Juanita S. La Rue,* Plaintiffs vs. *United States of America, Rogers C.B. Morton,* Secretary of Interior, *E.I. Rowland,* State Director of Bureau of Land Management, and *Marshall Matley, Clifford Matley, John Matley,* and *Wayne Matley,* dba M.S. Land and Livestock Company, a Co-partnership, Defendants; *United States District Court, District of Nevada,* R-2827). Appellants are now appealing the decision of the Federal District Court and the 9th Circuit Court of Appeals which held that the decision of the IBLA was not arbitrary and capricious and did not show an abuse of discretion or error of law, and denied damages.

REASONS FOR GRANTING THE WRIT

1. FRAUD AND COLLUSION CANNOT BE IGNORED. ANY CASE WHICH CONDONES FRAUD, WHETHER DIRECTLY OR BY IMPLICATION, SHOULD BE REVIEWED.

Because of the very nature of a fraudulent act, fraud cannot be ignored by any legal tribunal. Fraud is the intentional wrongdoing by one party upon another. Fraud is the intentional misstatement of facts for purposes of misleading another party. In 37 C.J.S. 204, Fraud, Sec. 1, it is stated as follows:

> While the broad outlines of fraud have been indicated by regarding it as including any cunning, deception, or artifice used, in violation of a legal or equitable duty, to circumvent, cheat, or deceive another, the forms it may assume and the means by which it may be practiced are as multifarious as human ingenuity can devise, and the courts consider it unwise or impossible to formulate an exact, definite, and all inclusive definition thereof. It is synonymous with, or closely allied to, other terms indicating positive and intentional wrongdoing, but is distinguishable from mistake and negligence.

The reasons why fraud is always completely abhorred by courts are obvious. If fraudulent acts were allowed to go unanswered, the path would be clear for the worst elements in human nature to prey on the honesty and good faith of most people. For that reason, a fraudulent act can never be allowed to go unanswered and a person can never be allowed to gain by his fraudulent act.

The holdings of the lower proceedings in this case have allowed this to happen. Further, not only have

the fraudulent acts of private individuals gone unanswered in the present case; also involved is the participation in the fraud or at least the observance of the fraud by a government agent in the official performance of his job. The actions of the District Manager amount to nothing less than collusion with the Matleys in defrauding Elmor Hill, predecessor of Appellants. Such holdings must be reviewed. The policy against fraud simply cannot erode by allowing the acts present in the present case to stand.

Fraud cannot be ignored. If this case is not reviewed and is allowed to stand, it will represent the proposition that the commission of a fraud is not of controlling importance in a case if there are other issues. The lower decisions held that if the *results* of a fraudulent acts are justifiable in the discretion of a particular administrative agency, then the fact that the results were obtained by fraud is of no consequence. In other words, a person can gain by his fraudulent actions.

The lower holdings in this case have held that what occurred—i.e. the moving of a fence on federal grazing land—is something that is entirely discretionary within the administrative agency of the Department of the Interior; and, although the agency discretion had nothing to do with moving the fence, agency discretion had determined that the fence is in a satisfactory location.

What the lower courts and agencies failed to do was recognize that the fence was erected as a result of fraud. If the location of the fence is the result of

fraud, the lower courts and administrative agencies *cannot* justify that location as satisfactory under agency discretion. To do so would be rewarding the fraud and collusion which resulted in the erection of the fence at its present location.

If the location of the fence is the result of fraud, the lower courts and administrative agencies should have removed the fence to the correct boundary line irregardless of agency discretion.

The existence of fraud in this case is clearly substantiated by the facts. For that reason the facts are set out in detail supra. From the facts several very basic conclusions are obvious. A fraud was committed with the help of government officials. Specifically, one grazing licensee committed a wrongdoing on another grazing licensee. The commission of this wrongdoing was aided by the actions of a BLM District Manager. The result of the wrongdoing is that one grazing licensee gained additional grazing land at the expense of another. This fraud has gone unanswered.

Yet, faced with these facts, the agencies of the Department of the Interior and the courts below have refused to correct the wrong. One grazing licensee has been allowed to gain Federal grazing land by the commission of fraud on another licensee and by making false statements on Federal transfer forms.

Importantly, at least one agency below recognized the commission of the fraud, yet it failed to apply basic law and correct the situation by relocating the fence in question. That agency, the Interior Board of Land Appeals, held that the Matleys *must have known* that they did not own the grazing rights which they told Hill that they did have. Further, the Matleys made application to transfer these grazing privileges to Elmor Hill as consideration for a fence line. Elmor Hill would be giving up grazing ground which the Matleys would be receiving in exchange for these non-existent grazing rights.

The Interior Board of Land Appeals, in its decision at 9 IBLA 213 in discussing the actions of Respondents Matleys held as follows:

> . . . Moreover, *there is no question that intervenor* (Matleys) *must have known at the time of the 1958 cooperative agreement that the consideration for that agreement, i.e. 1400 AUM's were not intervenors to transfer.* Fifteen months before the fence cooperative agreement was signed the intervenor (Matleys) had lost any hope of being awarded the AUM's which it offered Hill. *Matley Brothers,* et al., supra. We also note that the former BLM Range Manager (Dante Solari) who signed both the cooperative agreement and rejection of the transfer application should have known of the Department's decision holding that intervenor (Matleys) had no right to the grazing privileges which it subsequently offered Hill. (Emphasis added).

Thus, the IBLA made a factual finding which amounts to a civil wrongdoing by the Matleys, and that wrongdoing was fraudulent since it was done with knowledge.

In *Eddon Brinkerhoff,* 76 IBLA 110, April 21, 1976, the Interior Board of Land Appeals had to interpret the meaning of "willful" intent in regards to a grazing trespass. That decision held as follows:

> In determining whether grazing trespasses are "willful" intent sufficient to establish willfulness may be shown by proof of facts which objectively show that the circumstances do not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent.

The facts in the present case are clearly sufficient to show that Matleys were not acting in good faith or innocent mistake, and as a result, their acts were willful.

Nevertheless, the IBLA in the present case refused to do anything. The IBLA went on to hold that "fraud is not of controlling importance." Such a position is not in accordance with established law and cannot be allowed to stand.

> "It is the general rule that a person who engages in a fraudulent scheme forfeits all rights to protection. No one will be permitted to take advantage of, or claim protection by reason of his fraud." 23 Am. Jur. 1002 notes 16 and 17.

What the Department of Interior did by taking the approach it did in the present case was to tell ranchers that they are free to scheme and plan on how to fraudulently get their neighbors to move a boundary fence on Federal grazing land. A rancher who is new in an area is especially susceptible. Once the fence is moved, *the defrauded rancher* then has to convince the BLM to move the fence back to its original location. All that the defrauding rancher has to do is con-

vince the BLM that the fence is in a good location. According to the present case, the BLM will take the position that "the issue is not how the fence came to be, but whether it should remain". Such a statement will stand for a *BLM policy to cheat, lie and conceal.*

Certainly the BLM, when faced with the cost of moving the stock fence, is likely to find that in its discretion the fence is in a satisfactory position and that the Federal grazing land is fairly divided. The fraudulent act will be rewarded and go unanswered. As a result, such an approach cannot be taken. If the location of the fence is the result of fraud, then the BLM and Department of Interior must be concerned with the issue of how the fence came to be. That issue cannot be ignored, especially if fraud is involved.

Further, if the location of the fence is the result of fraud, the fence must be moved to the correct location. A person who commits fraud on his neighbor to move a fence cannot be protected by the BLM's decision that the fence is in a good location.

The issue of fraud must always be of controlling importance. A party cannot be allowed to benefit by his intentional wrongdoing. A party cannot be protected after he has committed an intentional wrongdoing and gained thereby. The wrongdoing cannot be dismissed as unimportant on the grounds that the result of the wrongdoing can be justified as achievable by other means. This has been allowed to happen in the present case.

A policy of ignoring fraud simply cannot be allowed to stand at any level. The holdings of the lower

courts and administrative agencies in this case establish such a policy and therefore deserve review.

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2. WHENEVER A GOVERNMENTAL OFFICIAL, GOVERNMENTAL DOCUMENTS, AND GOVERNMENTAL PROCEDURES ARE DIRECTLY INVOLVED IN THE COMMISSION OF A FRAUD AND COLLUSION, THE PERSON COMMITTING THE FRAUD AND BENEFITTING THEREBY CANNOT BE PROTECTED BY GOVERNMENTAL AGENCIES AND COURTS.

In the present case, the commission of the fraud involved a governmental official, the District Manager of the Bureau of Land Management; governmental documents—specifically an "Application for Transfer of Grazing Privileges Land Base"; and governmental procedures for transferring grazing rights.

In its findings, the IBLA held that the BLM District Manager, who accepted the Application for Transfer of Grazing Rights, "*should have known* of the Department's decision holding that intervenor (Matleys) had no right to the grazing privileges which it subsequently offered Hill."

Further, at the time of the Application for Transfer, the Transferee's attorney sent the transmittal letter to the same BLM District Manager asking him if there was anything wrong with the proposed transfer. There was no response to this letter.

Than, three years after the Application of Transfer was made, *and one day after the death of the transferee*, the transfer was denied by the same BLM District Manager on the grounds that the applicants

(Matleys) did not own the grazing rights which they proposed to transfer.

These facts would strongly indicate knowledge by the District Manager of the Bureau of Land Management of what Matleys were attempting to do. Yet these facts were laid aside as unimportant in all of the proceedings below.

Several important public policy considerations are involved in these facts and they were disregarded by the lower proceedings.

First, and very importantly, there exists the strong possibility of an intentional wrongdoing by a governmental official, the BLM District Manager, as indicated by the facts. Yet, none of the lower decisions give this issue any consideration.

Secondly, there is the desired policy of requiring government officials to perform their duties in a manner deserving the respect of the public. This is important since most people rely on the accuracy of governmental records and documents in the conduct of their everyday business.

To allow the BLM District Manager to leave unanswered the reasons for his actions in the present case is an unacceptable policy. If nothing else, the District Manager accepted the Application for Transfer with the clear evidence before him that the Transfer document contained false statements. Yet he accepted the Application. Three years later, and one day after the death of the transferee, the same District Manager denied the proposed transfer on the

grounds that the grazing rights were not owned by the Applicant Matleys.

If the above actions of the District Manager were done with the knowledge that the purported grazing rights were nonexistent—and the evidence so indicated —then the District Manager violated 18 U.S.C. 2 which states as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The District Manager should answer for his actions. An inquiry should have been made by the lower courts. The District Manager did not testify at the request of the BLM attorney. However, even though the facts were brought out and emphasized by Appellants, the actions of the BLM District Manager were ignored. *It seems clear to Appellants that the federal government should be prosecuting the people whom it has protected in this case.*

Certainly any lower decision which even approaches a position of excusing or condoning the wrongdoing of a governmental official in the performance of his duty should be reviewed. Recent national events have demonstrated that wrongdoing in an administrative agency at any level cannot be allowed to go unanswered.

3. WHENEVER A PERSON HAS COMMITTED A FEDERAL CRIME RESULTING IN GAINS TO THAT PERSON, THE COMMISSION OF THE CRIME CANNOT BE IGNORED BY GOVERNMENTAL AGENCIES AND COURTS IN A CIVIL ACTION.

In order to transfer the grazing rights to Elmor Hill, the Matleys had to apply for transfer on a form entitled "Application for Transfer of Grazing Privileges Land Base", which was signed on behalf of the Matley Brothers.

The Matleys made a false statement on that "Application". The false statement made on the "Application for Transfer of Grazing Privileges Land Base" was to the effect that the Matleys owned certain grazing privileges and had the right to transfer those privileges. However, the Matleys did not own the grazing privileges which they attempted to transfer.

On this application form it is also stated as follows:

> . . . We certify . . . that I have the lawful right to make such transfer—I certify that the statements in this application are true, complete and correct to the best of my knowledge and belief, and are made in good faith . . .
>
> Title 18, USC Sec. 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious or fraudulent statements or representations as to any matter within its jurisdiction.

Thus, it is clear that the issue of whether or not a serious crime was committed depends on the knowledge and intent with which the false statement was made.

Importantly, the IBLA held as follows on the issue of knowledge and intent by the applicants:

> ". . . Moreover, *there is no question that* intervenor (Matleys) *must have known* at the time of the 1958 cooperative agreement that the consideration for that agreement, i.e. 1400 AUM's (grazing rights) were not intervenors to transfer."

The IBLA made a factual finding which amounts not only to a civil wrongdoing by the Matleys, but which also amounts to a violation of the Federal Criminal Statute. Nevertheless the IBLA failed to do anything. Rather, it ignored its factual finding. The IBLA decision went on to state:

> "Nevertheless, the question of fraud is not of controlling importance in this case . . . the issue in this case is not how the fence came to be, but whether it should remain."

How can the apparent commission of a serious crime be disregarded as unimportant and not controlling? When can the commission of a crime take secondary importance and be disregarded and ignored on the grounds that the result of the fraud and crime can be justified as "agency discretion"?

Further, not only does it appear that respondent Matleys committed a violation of 18 U.S.C. 1001, but the action of BLM District Manager also amounts to a violation of 18 U.S.C. 1001.

In *U.S. v. Meyers,* D.C. Colo. 1955, 131 F. Supp. 525, it was held as follows:

> "This section, 18 USC 1001, making willfully false statements, on entries in any matter within

> any jurisdiction of any department of the United States, an offense was designated to insure the whole world, government and general public employees alike, instrument, on statement made by a government employee, great or small, in his capacity and in course of his official duties, can be relied upon by all."

Further, in the present case, Mr. Dante Solari, Range Manager of the Bureau of Land Management, was sent the transmittal letter by the attorney for Mr. Elmor Hill, Respondents' predecessor.

In this letter, Mr. Solari was asked to notify the attorney if anything was wrong with the proposed transfer of the 1400 AUM's from Matley to Hill. Mr. Solari knew that the Matleys did not even have the 1400 AUM's to transfer, yet he did not respond to that letter. Certainly, Mr. Solari's failure to respond is considered a statement to Mr. Hill's attorney that nothing was wrong with the proposed transfer of the 1400 AUM's.

> A party of whom inquiry is made concerning the facts involved in a transaction must not, according to well-settled principles conceal or fail to disclose any pertinent or material information replying thereto, else he will be chargeable with fraud. 23 Am. Jur. 860, notes 3 and 4; *Trout v. Harrell,* 217 Ark. 670, 233 SW 2d 233; *Sparks v. Guaranty State Bank,* 182 Kan. 165, 318 P.2d 1062; *Eisenschmidt v. Conway,* 196 Okla. 77, 155 P.2d 241; *Holland v. Columbia Iron Milling Co.,* 4 Utah 2d 303, 293 P.2d 700.

In *U.S. v. Diogo,* C.A. N.Y. 1963, 320 Fed. 898, it was held as follows:

"This section, (18 U.S.C. 1001) relating to falsification or concealment in statement or entries generally encompasses within its prescription two distinct offenses, concealment of material fact and false representation; and objection of the two offenses may be the same, to create or foster on the part of government agency misapprehension as to true state of facts."

Further, it was Solari's official duty and obligation to inform Matley that Matley could be held to a strict accountability for any statements made by him.

In the Code of Federal Regulations, Public Lands: Interior, Title 43, Section 1823.2-3, it is stated as follows:

> "Officers taking affidavit and testimony should call the attention of parties and witnesses to the laws respecting false swearing and the penalties therefor and inform them of the purposes of the Government to hold all persons to a strict accountability for any statements made by them."

Certainly, the knowledge of both Matley and Solari that there was a statement on the application which was false—certainly, this fact should have been considered by the IBLA and the lower court in deciding the merits of Appellants' case.

In any event, the IBLA held that the Matleys *knew* that they did not have the 1400 AUM's which they attempted to transfer to Hill. Thus, the statement was made "knowingly."

Further, the false statement about the AUM's was made "willfully". The word willfully has been defined as the "voluntary, intentional violation of a known

legal duty", when a criminal statute is involved. *U.S. v. Bishop,* 455 F.2d 612 (1972).

Certainly, the false statement as to the 1400 AUM's was made voluntarily and intentionally. Further, there is no question that Marshall Matley knew that he had a legal duty not to make the false statement that he had the lawful right to transfer the 1400 AUM's. Marshall Matley had been in the ranching business in excess of 40 years. He had served on the Grazing Advisory Board for 6 years and he was very familiar with requirements of obtaining and transferring AUM's. He was definitely not a layman in regard to BLM grazing matters.

Further, it is clear that 18 U.S.C. 2 applies here also. That section reads as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Dante Solari committed acts which aided and abetted the Matleys. He accepted the Application for Transfer which contained false statements about which both of the parties (Matleys and Solari) knew; also he failed to respond to the Forman transmittal letter which inquired about the transfer.

The holdings of the following cases indicate that Dante Solari could have violated 18 U.S.C. 2 and that at least an investigation was warranted.

In *White v. U.S.*, C.A. Kan. 1966, 366 F.2d 474, it was held that "aiding and abetting implies guilty knowledge."

Further, it was held in *U.S. v. Luxenberg,* C.A. Ohio 1967, 374 F.2d 241 as follows:

> Evidence was sufficient to sustain conviction of the defendant for aiding and abetting another in conspiring to defraud licensee of Small Business Administration, in violation of this section.

Further, it was held in *U.S. v. Fleming,* D.C. Ill. 1883, 18 F. 907, that "a clerk who knowingly assists in the fraudulent practices of his principal is as much a party to the fraud as the principal himself."

Clearly 18 U.S.C. 2 and the above case apply here. Matleys made a false statement on a federal form (the Application for Transfer) in violation of 18 U.S.C. 1001. Further, Dante Solari accepted that Federal form knowing about the false statement. This act by Danta Solari was a violation of 18 U.S.C. 2 since it aided and abetted the Respondents Matleys in the violation of 18 U.S.C. 1001.

The policy which is being established by the lower hearings is simply untenable and in need of correction.

A court cannot ignore a fraudulent act and the commission of a crime as uncontrolling and unimportant. In order to prevent such a policy from becoming established, the petition in this case should be granted.

4. THE ADJUDICATED BOUNDARY OF APPELLANTS' GRAZING ALLOTMENT CANNOT BE CHANGED WITHOUT THE BLM FOLLOWING PROPER PROCEDURES FOR READJUDICATION.

A final reason why this Petition for Certiorari should be granted involves the interpretation of that portion of the Taylor Grazing Act which pertains to adjudication and readjudication of the grazing rights of a licensee.

In the present case the BLM adjudicated certain grazing privileges to Appellants. Appellants were not able to gain access to all of their adjudicated grazing rights due to the fence in question. The lower courts and administrative agencies have labeled Appellants' attempts to have the fence relocated on their adjudicated boundary as an attempt to *readjudicate* their grazing allotment.

The effect of the lower decisions is to thus hold that the erection of a fence amounts to an adjudication. Such a position is not accurate and must be clarified.

The importance of the definitions of adjudication and readjudication must be emphasized. If a rancher with a Federal grazing allotment does not know what actions by himself or by the BLM may or may not constitute an adjudication of grazing privileges, that rancher cannot effectively operate his ranch and plan for future development.

Furthermore, in the Code of Federal Regulations, Title 43, Section 4115.2-13 (i), regarding rules dealing with "readjudication", it is stated as follows:

> No readjudication of any license or permit including free use license will be made on the claim of any applicant or intervenor with respect to the qualifications of the base property, or as to the livestock numbers or seasons of use of the Federal range allotment where such qualifications or such allotment has been recognized and license or permit has issued for a period of three consecutive years or more, immediately preceding such claim.

This does not apply to the present case. Appellants are seeking to have the fence moved to the boundary described in the adjudication of their allotment. Further, there was never an adjudication of the allotment boundary on the fence line in question. As a result, the matter involved in the case *is not a readjudication* and rules pertaining to readjudication should not be applied; as these were by the IBLA.

The importance of a grazing licensee knowing and understanding his rights as an adjudicated licensee are especially critical in view of recently imposed range control policies. These new policies in Nevada reduce and limit the number of days that a licensee can have cattle on his federal grazing land.

Further, other recent developments require that all range programs and developments must comply with environmental protection laws.

Also, the ruling of the Ninth Circuit Court of Appeals is contrary to a well established Department of Interior decision that boundary agreements between ranchers are binding contracts. Their holding

here is at odds with *Whitehill*. In *Wayne N. and Mary B. Whitehill*, D.I. Grazing Decision, 1936-58, pp. 486-490 it was held as follows:

> To all intents and purposes range line or allotment boundary agreements are contracts. They are entered into by two or more parties and the mutual promises of the parties to abide by the terms of the agreement and thus waive their rights to ask for a change in line or boundary thus established constitutes ample consideration to support a contract. Therefore, when an agreement has been entered into, compliance with the terms thereof should be required *unless it was consummated under conditions which, under general law would warrant the rescission of a contract* or unless it is incompatible with the proper administration of the Federal Range." (Emphasis added).
>
> . . . Unless the public interest or the needs of governmental administration require modification of the boundary line or withdrawal of some or all of the lands from a particular permittee or licensee, these range-line agreements are generally recognized by this Department as effective between the parties, unless it is clearly shown that force or coercion was used in effecting the range line agreement, or that rescission of the contract is warranted, or that radical changes have occurred which merit a reconsideration of the range line, or the parties themselves agree on a modification.

In its decision the 9th Circuit states as follows:

> The location of the fence line is not relevant to the agency's determination of grazing allotments

for the Appellants or for the Matleys. Any action of the landowners or their predecessors in interest affixing fence lines on federal lands need not be considered by the Bureau in making its independent determination of adequate grazing allotments for each rancher. Further, grazing allotments are not considered vested rights. 43 U.S.C. § 315b; Acton vs. United States, 401 F.2d 896, 899 (9th Cir. 1968) (dictum), cert. denied, 393 U.S. 1121 (1969). The Bureau of Land Management has continuing discretion in allocating grazing rights or in changing them from time to time, and there was no abuse of this discretion here.

As a result of the above, the rules and regulations of the Taylor Grazing Act must be clarified. A licensee must know what he owns and what are his rights when he is *adjudicated* a specific grazing allotment, as Appellants were in the present case. The lower decisions leave this issue unresolved. Consequently, the petition should be granted.

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5. APPELLANTS' CAUSE OF ACTION FOR DAMAGES SHOULD BE RECOGNIZED

Appellants filed an action for damages for misrepresentation against the defendant United States.

The factual situation in the present case amounts to a cause of action maintainable under 28 U.S.C. 1346 (b), which states as follows:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the

> United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office of employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act of omission occurred.

The Bureau of Land Management was negligent in many respects in failing to carry out its duties. The BLM did the following:

(1) it failed to disallow the application for transfer of the 1400 AUM's when it must have known about the invalidity of the transfer;

(2) it failed to properly notify Appellants about the location of the fence in question which prevents Appellants from using a certain portion of their allotment;

(3) it failed to move the fence to the adjudicated boundary of the Winnemucca Ranch;

(4) it failed to enter into a Range Line Agreement which notified Appellants that they did not have access to a certain portion of their allotment;

(5) it (through District Manager Dante Solari) failed to answer the transmittal letter of

Elmor Hill's attorney when it knew that there was something wrong with the transfer;

(6) it generally failed to keep its records so that Appellants would be informed about the location of the fence.

All of these above acts are grossly negligent and directly caused the loss which Appellants have suffered.

As a result, 28 U.S.C. 2680 (h), upon which the lower Courts relied, is not applicable to Appellants' Second Cause of Action because the negligent acts of the Government consisted not only of misrepresentation, but also of negligent performance of other tasks and duties, all of which caused Appellants' loss.

28 U.S.C. 2680 (h) states as follows:

> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

In *United Air Lines, Inc. v. Wiener*, 335 P.2d 379 (1964) one of the issues involved the failure of an employee of a government to properly inform an airplane as to the weather conditions. The court held that the liability of the United States was not barred by 28 U.S.C. 2680 (h) since there was negligent performance of other tasks and duties in addition to the misrepresentation of the weather conditions.

Similarly, in the present case, the United States is liable to the Appellants. The negligent acts of the BLM are so broad in scope and are negligent to such a degree that a policy should not be established allowing such acts to carry no liability to the party injured by these acts.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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July 12, 1976.

(Appendices Follow)

APPENDICES

Appendix A

43 U.S.C. 315 (e):

> Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve. Permittees shall be required by the Secretary of the Interior to comply with the provisions of law of the State within which the grazing district is located with respect to the cost and maintenance of partition fences. No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior. The decision of the Secretary in such cases is to be final and conclusive. June 28, 1934, c. 865, § 4, 48 Stat. 1271.

43 C.F.R. 4111.3-2 (2) (b):

> Permits, annual licenses. Grazing permits may be issued as soon as the necessary data can be obtained or after agreements as to the extent of their individual grazing privileges have been reached by the interested applicants and such agreements have been reduced to writing; a recommendation thereon made by the advisory board, and approval thereof given by the District Manager.

43 C.F.R. 4111.3-1 (a):

> (a) Grazing capacity: Seasons and maximum annual period of use. The District Manager, after

recommendation by the advisory board, will rate the grazing capacity of each unit or area in a grazing district and will classify each for the proper reasons of use and for the maximum period of time for which any licensee or permittee will be allowed to use the Federal range therein during any one year.

43 C.F.R. 4111.3-2 (c):

Allotments. Allotments of Federal range will be made to licensees or permittees when conditions warrant. Division of the range by agreement or former practice will be followed where practicable, provided such division is in substantial conformity with the qualifications for grazing privileges of the respective applicants and the agreement is reduced to writing and approved by the District Manager.

43 C.F.R. 1823.2-3:

Officers taking affidavit and testimony should call the attention of parties and witnesses to the laws respecting false swearing and the penalties therefore and inform them of the purposes of the Government to hold all persons to a strict accountability for any statements made by them.

43 C.F.R. 4115.2-13 (i):

No readjudication of any license or permit including free use license will be made on the claim of any applicant or intervenor with respect to the qualifications of the base property, or as to the livestock numbers or seasons of use of the Federal range allotment where such qualifications or such allotment has been recognized and license or permit has issued for a period of three con-

secutive years or more, immediately preceding such claim.

18 U.S.C. 2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. 1001:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749."

5 U.S.C. 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or;

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.

28 U.S.C. 1346 (b):

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after

January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act of omission occurred.

28 U.S.C. 2680 (h):

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Appendix B

Letterhead of
United States
Department of the Interior
Bureau of Land Management
District Office
801 N. Plaza Street
Carson City, Nevada 89701

Notice of Final Advisory Board Recommendation
and Decision of District Manager

Certified Mail No. 234567 December 24, 1969
Return Receipt Requested

W. Dalton La Rue, Sr.
dba Winnemucca Ranch
Reno, Nevada 89502

Sir:

The Advisory Board of the Carson City, Nevada Grazing District Number 3, on December 18, 1969, reconsidered your application for allotment boundary change in the light of additional information or protest filed by you and recommended as follows:

Affirmed their previous recommendation.

The recommendation, together with information and data in possession of the Bureau of Land Management has been considered by me, and you are hereby notified that my decision is as follows: I concur in the Advisory Board recommendation for the following reasons:

1. CFR 43 Part 4111.3.2(e) states "allotments of Federal range will be made to licensees or permittees when conditions warrent". The allotment of the Winnemucca Ranch as presently fenced encompasses sufficient forage to supply all the forage required to satisfy your Class I base property qualifications.

2. CFR 43 Part 4115.2-1(e)(13)(i) states "No

readjudication of any license or permit—will be made on claim of any applicant or intervener with respect to qualifications of the base property or as to livestock numbers or seasons of use of the Federal range allotment where such qualifications or such allotment has been recognized and license or permit has issued for a period of three consecutive years or more immediately preceeding such claim." The fence which was constructed in 1958-59 in cooperation with your predecessor, Elmer Hill, and Matleys as a boundary between the two allotments was accepted by them as their allotment boundary for more than three consecutive years.

3. Based upon similar situations the Department of the Interior has consistantly held under the grazing regulations that where a permittee has been given all the grazing privileges to which he is entitled, he cannot complain of the allotment made to others or the area of use assigned to him.

I therefor reaffirm the fenced line as presently located through the public domain lands as the east boundary of your allotment.

If you wish to appeal this decision for the purpose of a hearing before an Examiner, in accordance with 43 CFR 1853.1, you are allowed thirty (30) days from receipt of this notice within which to file such appeal with the District Manager, Bureau of Land Management, 801 N. Plaza Street, Carson City, Nevada 89701. The appeal should specify the reasons, clearly and concisely, as to why you think this decision is in error.

Very truly yours,
/s/ Horace E. Jones
Horace E. Jones
District Manager

cc:
Sanford & Sanford, Attorneys

Letterhead of
United States Department of the Interior

Office of Hearings and Appeals
Hearings Division
6432 Federal Building
Salt Lake City, Utah 84111

October 28, 1971

DECISION

Notified Oct 30
Received Nov 2

W. Dalton La Rue, Sr. and Juanita S. La Rue, dba Winnemucca Ranch, Appellants,	Nevada 3-70-1
M. S. Land and Livestock Company, Intervenor.	

Appeal from District Manager's Decision dated December 24, 1969, Carson City District.

APPEAL DISMISSED

By this action[1] Appellants seek review of the decision of the District Manager, Bureau of Land Management (BLM), which denied Appellants' request to relocate the fence which runs between the Winnemucca Ranch and Paiute Canyon allotments. The request was made by letter to the District Manager, dated March 7,

[1]Brought under provisions of the Taylor Grazing Act, as amended (48 Stat. 1269 et seq.; 43 U.S.C. 315 et seq. (1964)), and Departmental Hearing Procedures (43 CFR, Subpart 1853).

1969, in which Mr. La Rue states in effect that: (1) there is a discrepancy between the legal description of the adjudicated boundary line and the fence line as constructed; (2) when negotiating the purchase of the Winnemucca Ranch in 1966, it was represented that the legal description of the Winnemucca Ranch allotment was as shown on the 1958-59 grazing license of the Horseshoe Cattle Co. (Ex. 2), a predecessor in interest of the base property; (3) the same legal description appears on each of the succeeding annual licenses as well as on a range line agreement signed by Appellants on May 26, 1967, and approved by the District Manager on June 23, 1967 (Ex. 9); (4) a map attached to the range line agreement shows the fence as constructed to be at variance with the written legal description; (5) the fence excludes Appellants from use of some of their deeded lands in Sections 17 and 18, T. 24 N., R. 20 E., and Section 32, T. 25 N., R. 20 E.; (6) the fence creates a serious range hazard because the only water is on Appellants' deeded lands, and accordingly, (7) the fence should be moved to conform to the legal description as contained in the licenses and the range line agreement.

By decision of December 24, 1969, the District Manager denied the request, for the following reasons:

1. CFR 43 Part 4111.3.2(c) states "allotments of Federal range will be made to licensees or permittees when conditions warrant". The allotment of the Winnemucca Ranch as presently fenced encompasses sufficient forage to supply all the forage required to satisfy your Class I base property qualifications.

2. CFR 43 Part 4115.2-1(c)(13)(i) states "No readjudication of any license or permit—will be made on claim of any applicant or intervener with respect to qualifications of the base property or as to livestock numbers or seasons of use of the Federal range allotment where such qualifications or such allotment has been recognized and license or permit has issued for a period of three consecutive years or more immediately preceding such claim." The fence which was constructed in 1958-59 in cooperation with your predecessor, Elmor Hill, and Matleys as a boundary between the two allotments was accepted by them as their allotment boundary for more than three consecutive years.
3. Based upon similar situations the Department of the Interior has consistently held under the grazing regulations that where a permittee has been given all the grazing privileges to which he is entitled, he cannot complain of the allotment made to others or the area of use assigned to him.

I therefor reaffirm the fenced line as presently located through the public domain lands as the east boundary of your allotment.

In conjunction with that decision, the District Manager wrote a letter to Appellants, also dated December 24, 1969 (Ex. D), in which he said in part:

> There is nothing to say but to admit that an error was made by personnel in this office when you were not furnished an accurate description of your allotment boundary when you were contemplating buying the ranch and again when you

> were issued an allotment description in May, 1967. The description made reference to the fence but then the narrative described the old allotment line which was described in a decision issued several years before the fence was built. The Winnemucca Ranch Allotment description was not properly revised in our records after the fence was constructed.
>
> The fact that your allotmeat description was in error does not provide a basis for abandoning an allotment boundary established with the concurrence of your predecessor in interest and in fact with his cooperation as he provided funds to pay for part of the cost of the fence. The Secretary of the Interior has held in many instances in similar situations that a boundary line thus established cannot be changed without mutual consent of the parties involved or unless one party is denied his fair share of available forage. Since your allotment contains sufficient forage to meet your Federal range qualifications you have received your fair share of the Federal range forage. Therefor, I have no legal basis to remove a portion of the allotment from M. S. Land & Livestock Company and place it in your allotment and have the fence reconstructed in a new location.
>
> The fact that Mr. Matley applied for and was denied a transfer of grazing privileges to your predecessor for forage within the Winnemucca Ranch area forms no basis for changing the fence line. There was agreement on the actual location of the fence by all the parties at the time of construction as witnessed by a letter to this office from your predecessor. It is apparent that the fence was located by verbal agreement of the par-

ties across the private land at Horse Springs so both could share the water there. Since there is no written agreement that requires the sharing of the water you are free at any time to relocate that portion of the fence at your expense so that all your private land is on your side of the fence. That also applied to some deeded land down in the valley. The relocation of the fence at Horse Springs may relieve the pressure you mentioned on the fence in that area.

In their appeal filed January 27, 1970, the Appellants admit that the allotment as fenced provides them sufficient forage to satisfy their Class I demand but allege that proper range management is not possible unless the fence is moved to the so-called adjudicated boundary as defined by the written description in the range line agreement and the previous licenses. They also allege that their predecessor in interest, Elmor Hill, d.b.a. Horseshoe Cattle Company, was fraudulently induced by Matley Brothers (Intervenor here as M. S. Land & Livestock Company) into entering into an agreement (Ex. 3) to construct the fence in its present location.

A hearing on the appeal was held on September 1 and 10, 1970, at Reno, Nevada. At the beginning of the hearing, the M. S. Land & Livestock Company was permitted to intervene. Appellants were represented by Emerson J. Wilson, Attorney at Law, Reno, Nevada; the Bureau of Land Management by Otto Abo, Field Solicitor, Department of the Interior, Reno, Nevada; and Intervenor by Brian L. Hall, Attorney at Law, Reno, Nevada.

Base Properties and Allotments

Appellants and Intervenor own neighboring ranches in Winnemucca Valley, known respectively as the Winnemucca Ranch and the Paiute Canyon Ranch. Both ranches are base properties qualified for Class I grazing privileges on the Federal range. The privileges attached to the Winnemucca Ranch are exercised in the Winnemucca Ranch Allotment and those attached to the Paiute Canyon Ranch are exercised in the Paiute Canyon Allotment, both a part of the Reno Unit.

Appellants acquired ownership of the Winnemucca Ranch in late 1966 from North American Aviation, Inc., which had acquired it earlier that year from the Horseshoe Cattle Co. The latter company, which acquired the ranch sometime prior to 1958, was owned by Elmor Hill until his death in November, 1961 and then by his estate or heirs until the sale to North American Aviation, Inc.

The Intervenor, a co-partnership comprised of Marshall and John Matley and sometimes known as Matley Brothers (Tr. 12), has owned the Paiute Canyon Ranch and exercised grazing privileges in the Paiute Canyon Allotment since prior to 1958.

Division Fence

In August, 1958, Intervenor and Horseshoe Cattle Co. entered into a Section 4 cooperative agreement,[2] approved by the District Manager on August 29, 1958,

[2]Under authority of 43 U.S.C. § 315 e. (1964 Ed.)

to construct a fence over the public domain separating the Winnemucca Ranch and Paiute Canyon Allotments, to be known as the Winnemucca Valley Division Fence (Ex. 6). Under the agreement the BLM was to furnish all fence materials and bulldozing of the fence line and the cooperators were to furnish the labor. In advance of the written agreement, the fence line had been walked and flagged by the then District Manager, the Matleys and Elmor Hill (Tr. 136). Both Marshall Matley and Hill were present when BLM personnel bladed the flagged line (Tr. 69). The fence was constructed on the bladed line during the fall-spring of 1958-59 and accepted as satisfactory by Intervenor and the Horseshoe Cattle Co. (Exs. 7-8; Tr. 45, 190). The fence line, as constructed and as it remains today, is depicted on a rough sketch map attached to the BLM Final Project Report dated June 22, 1959 (Ex. F) and on a more detailed map prepared recently (Ex. 10). It is presently in good condition and with annual inspection and repairs should last indefinitely (Tr. 192).

Boundaries of the Winnemucca Ranch and Paiute Canyon Allotments

With the completion of the fence in May, 1959, the fence line was thereafter regarded by Intervenor, the Horseshoe Cattle Co., and the BLM as the boundary line dividing the two allotments (Tr. 55, 127-128, 214-215, 216-228).

By Notice of Allocation of Grazing Privileges and Allotment Boundary, dated February 26, 1962, (Ex.

M-3), the District Manager set forth Intervenor's qualification for Class I grazing privileges in the Paiute Canyon private allotment, the boundaries of which are as outlined on the official unit allotment map (Ex. M-2) and as described in narrative form in a separate document (Ex. M-6). Both the map and the narrative description show the fence line at issue as being, substantially, the boundary of that portion of the allotment (Tr. 134, 210-217).

The record description of the Winnemucca Ranch allotment, as it appears in various documents, contains certain inconsistencies. Prior to the agreement to construct the fence, the allotment boundary was an imaginary line described by metes and bounds which lies in large part over one mile easterly of the fence. This line is referred to as the *approximate adjudication boundary* and is so identified and depicted on Exhibit 10. Construction of the fence on that line would increase the forage available in the Winnemucca Ranch Allotment by 259 AUMs, resulting in a corresponding decrease in the Paiute Canyon Allotment (Tr. 51-52).

This metes and bounds description was used to describe the allotment boundary in the license issued to the Horseshoe Cattle Co. in 1958 (Ex. 2). Notwithstanding the subsequent construction of the fence, the same description was used in that company's licenses for succeeding years up until 1966 when Appellants acquired the base property. In Appellants' first approved application for grazing privileges, dated January 28, 1967 (Ex. J), the allotment boundaries are

indicated to be the same as described in the 1958 license of the Horseshoe Cattle Co.

As discussed above, the fence line description contained in the cooperative agreement and the final project report is at variance with the description of the allotment in the licenses. In addition, a range line agreement, purportedly describing the Winnemucca Ranch Allotment, executed by Appellants and approved by the District Manager on June 23, 1967 (Ex. 9) makes reference to *the Winnemucca Valley fence,* but with obvious ambiguity, goes on to describe by metes and bounds the so-called *adjudication boundary* described in the 1958 license.

After extensive examination of the BLM records and upon receiving assurances from BLM personnel that the 1958 license accurately described the allotment, Appellants took possession of the ranch on December 19, 1966 (Tr. 140). Thereafter, on May 19, 1967, Appellants were requested by the BLM to sign the range line agreement (Ex. 9), and upon being assured that it described the allotment the same as did the 1958 license, they signed the document (Tr. 141-142). The following month Appellants learned that the division fence did not follow the line described in the 1958 license (Tr. 142-143) and it was not until August 20, 1968, that they received a copy of the cooperative agreement (Ex. 6) from the District Manager which showed the fence line description to be different from the description contained in the 1958 license.

Following this, Appellants had several discussions about the matter with BLM personnel and, by letter

dated March 7, 1969 (Ex. A), made a formal request to have the fence moved to the adjudicated boundary. In response, the District Manager made it clear in his letter of December 24, 1969, (Ex. D) that the allotment descriptions contained in the documents previously furnished Appellants were not accurate and that the fence as constructed was the boundary line dividing the allotments.

From the evidence presented, it is concluded and found that since May 1, 1959, the Winnemucca Valley division fence, as presently located, was intended by the BLM to be the boundary line between the two allotments.

Contentions that the Range Line Agreement was Based on Misrepresentation and that the Fence Should be Relocated to Conform to the Allotment Description Shown in the 1958 License

Appellants contend that their predecessor in interest, Elmor Hill of the Horseshoe Cattle Company, entered into the 1958 cooperative agreement to construct the fence relying on the representation that he would receive, by transfer, 1,400 AUMs of grazing privileges from Intervenor (Ex. 3). Intervenor's application to transfer these privileges was denied by the District Manager on November 15, 1961 (Ex. 4) on the grounds that the Home ranch upon which the application was based was not entitled to Class I privileges. The rejection was signed one day after the death of Mr. Hill (Ex. L). Appellants allege that Intervenor knew that he had previously been dis-

possessed of the 1,400 AUMs (Exs. G, H and I), and thus his misrepresentation to Mr. Hill renders the cooperative agreement subject to rescission for lack of consideration (Tr. 167).

Assuming that Mr. Hill's reliance on Intervenor's representation was misplaced does not alter the fact that the fence as completed in 1959 established the boundary line for the two allotments. If Intervenor, through the alleged wrongdoing, had acquired more than his entitlement, then that would be a matter for settlement between itself and the BLM. In this regard, the testimony shows that if the fence were to be moved to the so-called adjudication boundary, Intervenor's allotment would not provide sufficient forage to meet his Class I demand, whereas Appellants' allotment would provide an amount in excess of their demand, which excess would have to be licensed as Class II to adjoining operators (Tr. 51-52). Since the individual allotments were established over ten years ago and accepted and used without protest by Intervenor and Appellants' predecessor in interest, Appellants are precluded by Section 4115.2-1(e)(13)(i) of the Grazing Regulations (supra) from now questioning the motivating factors which brought about the establishment of the allotment boundaries. *Delbert and George Allan, Eldon L. Smith, et al.,* 2 IBLA 35 (1971); *Malvin Pedroli et al.,* 75 I.D. 63 (1968).

As to the right to have the fence relocated simply for the reason of conforming it to the allotment description contained in the 1958 license, Departmental de-

cisions make it clear that a grazing permittee has no right to any particular area of the Federal range, *National Livestock and Zack Cox,* I.G.D. 55 (1938), and the designation of an individual grazing allotment for any particular permittee is within the discretion of the BLM which can only be challenged on the basis that the allotment does not have the grazing capacity found by the BLM and that it is incapable of satisfying the allottee's authorized grazing use. *Thomas Ormachea and Michael P. Casey,* 73 I.D. 339 (1966); *Harold Babcock et al.,* A-30301 (June 16, 1965). *Fred B. Buckingham et al.,* 72 I.D. 274 (1965). Since Appellants concede that their allotment as now fenced provides sufficient forage to satisfy their authorized grazing use, the erroneous allotment description in the license affords them no basis for the relief sought.

Contentions that the Existing Fence is not Compatible with Good Range Management and Interferes with Proper Management of Appellants' Base Property

In support of these contentions, Mr. La Rue testified that the fence in its present location creates a problem of neighbor's cattle trespassing through the fence, requiring constant policing on his part (Tr. 154-159); that the fence has pockets where cattle gather and put pressure on the fence, trying to break through to water, which problem would be eliminated if the fence were relocated to the adjudicated boundary line (Tr. 170, 172-173); and that if the fence were simply re-

aligned to the boundaries of Appellants' deeded lands as suggested by the BLM (Exs. D, E), [The fence cuts across some of Appellants' deeded lands leaving portions of them in the Paiute Canyon Allotment (Tr. 9, Ex. 10)] additional pockets would be created causing worse pressure from cattle trying to break through into Appellants' allotment (Tr. 156, 158-159). Intervenor Matley and BLM personnel do not agree with Appellants' position. Mr. Matley testified that, considering the topographic features of the country, it was easiest to build a fence along the line on which it was constructed (Tr. 126); that the present location of the fence provides for the best range management and makes available the forage necessary to satisfy the demand of both users (Tr. 127-128); and that from the time the fence was constructed in 1959 until Appellants acquired the Winnemucca Ranch, the parties experienced no difficulty in making proper use of the range (Tr. 133). Mr. Kenneth E. Harrison, BLM Area Manager of the Reno Resource Area, testified that from the standpoint of terrain the fence should be in its present location. He said the terrain of the adjudicated boundary line is extremely craggy and absolutely inaccessible except by foot or horseback, whereas the actual fence line is not as steep and rocky and permitted blading with mechanical equipment (Tr. 43-44). He said further that relocation of the fence to the adjudicated boundary line would contribute nothing to the Winnemucca Ranch operation because their cattle could not be distributed up the mountain to the east because of lack of

water (Tr. 53-54), but that it would adversely affect Intervenor's operation in the movement of its cattle from its ranch to the Mahogany Flat area to the north (Tr. 54); and that it would create too much grazing area for Appellants' Class I demand and leave Intervenor short of its demand (Tr. 51-52). He also testified that BLM files contain no correspondence which would indicate dissatisfaction with the fence until Appellants acquired the base property after 1966 (Tr. 45). Mr. Bill Ray Stewart, presently employed by the BLM in the Carson City District and formerly employed, from 1952 to 1961, by the Horseshoe Cattle Company, generally confirmed the testimony of Mr. Harrison. He was foreman of that company at the time the fence was built and he knew of no problems with the fence as far as that operator was concerned (Tr. 190). In his opinion, the fence was constructed in the logical place to best serve the interests of both ranches, as well as the BLM. He fails to see where there is pressure exerted on it from Intervenor's side or how it in any way interferes with Appellants' livestock operation (Tr. 181-192).

From the evidence presented, the conclusion is inescapable that Appellants failed to meet the burden of proving[3] that the existing fence is not compatible with good range management and interferes with proper management of their base property.

---

[3] *E. L. Cord, dba El Jiggs Ranch*, 64 I.D. 232 (1957); *Harold Babcock et al., supra.*

ORDER

The appeal is dismissed.

/s/ L. K. Luoma
L. K. Luoma
Hearing Examiner

Enclosure: Information Pertaining to appeal procedure.

Distribution:
By Certified Mail

Mr. Emerson J. Wilson, Attorney for Appellant
Wilson, Hale & Belford
90 Court Street, Reno, Nevada 89504

Mr. Marshall Matley, M. S. Land & Livestock Co.
1867 Wren Street, Reno, Nevada 89502

Mr. Otto Aho, Field Solicitor, Office of the Field Solicitor
2004 Federal Bldg. & U. S. Courthouse
300 Booth Street, Reno, Nevada 89502

cc:
Hearings Division, Washington, D.C.
Director, BLM, Washington, D. C.
State Director, BLM, Nevada
District Manager, BLM, Carson City, Nevada
Standard Grazing List

9 IBLA 208

Letterhead of
United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

W. DALTON LA RUE, SR.

and

JUANITA S. LA RUE,

d/b/a WINNEMUCCA RANCH, APPELLANTS;

M. S. LAND AND LIVESTOCK COMPANY, INTERVENOR

IBLA 72-179 Decided January 30, 1973

Appeal from a decision (Nevada 3-70-1) by L. K. Luoma, Administrative Law Judge,[1] affirming a denial of a request to relocate a fence which runs between the Winnemucca Ranch and Paiute Canyon Grazing Allotments.

Affirmed.

Grazing Permits and Licenses: Adjudication

Range agreements are, to all intent and purposes, contracts, and thus must comply with general legal principles applicable to contracts.

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[1]The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

Grazing Permits and Licenses: Apportionment of Federal Range

A Federal range licensee has no right to any particular area of the Federal range.

Grazing Permits and Licenses: Adjudication

A licensee's only reasonable basis for challenging the area of his grazing allotment is to show the allotment to be incapable of satisfying the allottee's authorized grazing demand.

Grazing Permits and Licenses: Apportionment of Federal Range

The Bureau of Land Management has the right to exercise its discretionary power to modify existing allotments even after a licensee has lost his right to do so under 43 CFR 4115.2-1(e)(13)(i).

APPEARANCES: Peter I. Breen, Esq., Emerson J. Wilson Ltd., Reno, Nevada, for appellants; Brian L. Hall, Esq., Barry & Hall, Reno, Nevada, for Intervenor; Otto Aho, Field Solicitor, for the Department of the Interior.

OPINION BY MR. STUEBING

This is an appeal by W. Dalton La Rue and Juanita S. La Rue, d/b/a Winnemucca Ranch from a decision of Administrative Law Judge L. K. Luoma, dated October 28, 1971, denying their request to relocate a stock fence which runs between the Winnemucca Ranch and Paiute Canyon allotments. The parties interested in this case are: The La Rues, appellants and owners of the Winnemucca Ranch; the Bureau of Land Management, with a brief in support of the

Administrative Law Judge's ruling; the Matley Brothers, d/b/a M. S. Land and Livestock Company, intervenor.

A history of the area and ranches in question is necessary to an understanding of this case. Prior to 1949 the Matley's had control of a large area containing both ranches involved in this appeal. In the fall of 1949, the Matley's sold the Winnemucca and another ranch to a Mr. Gilbert. That year the Matley's allowed Gilbert to use a portion of the range here in issue. The following year both Gilbert and the Matleys applied for the use of the same range. During the time when an appeal from a decision dividing that range was pending, Gilbert sold to Hill. The appeal was settled by a decision allowing the Matley's a drift on the Winnemucca Ranch. (Tr. 66). Because of the problems inherent in the drift arrangement (Tr. 67), in 1958 Hill (d/b/a Horseshoe Cattle Company) and intervenor entered into a Section 4 cooperative agreement to build a fence over public domain separating the Winnemucca Ranch and the Paiute Canyon Allotments. That agreement was approved by the District Manager on August 29, 1958. Under the agreement, the Bureau of Land Management was to furnish the fencing materials and the bulldozing and the cooperators were to furnish all the labor. The fence was flagged and built in the presence of the District Manager, the Matleys and Hill. (Tr. 69, 136). The fence, which was completed in the fall-spring of 1958-1959, was accepted by Hill and the Matleys as satisfactory and remains today along the same line as it was orig-

inally strung. (Ex. 10). The fence was known and referred to as the Winnemucca Valley Division Fence. (Ex. 6).

The fence line was thereafter regarded by the Horseshoe Cattle Company, intervenor and the Bureau of Land Management as the dividing line between the two allotments. (Tr. 55, 127-128, 214-218). The file contains documents verifying this. The boundary on the official unit allotment map (Ex. M-2) is substantially the same as the fence boundary. The Notice of Allocation of Grazing Privileges and Allotment Boundary (Ex. M-3) prepared in 1962 by the District Manager establishing intervenor's qualifications for Class I grazing privileges on the Paiute Canyon private allotment indicates the same boundary as the official map. Another document, which is a narrative description of the area, also treats this line as the boundary. (Ex. M-6).

However, there are certain discrepancies in the description of the Winnemucca Ranch allotment as it appears in various documents. Prior to the agreement to construct the fence, the allotment boundary was a line established by metes and bounds, but without a fence, which lies in large part over one mile east of the present fence. The metes and bounds description was used to describe the allotment boundary in a license issued to the Horseshoe Cattle Company in 1958 (Ex. 2). Even after the construction of the fence, the same description was used in the Horseshoe Cattle Company's license each year until 1966 when the appellants acquired the property. In ap-

pellants' first approved application for grazing privileges, dated January 28, 1967, (Ex. J), the allotment boundaries are the same as those described by the metes and bounds boundary description in the 1958 license to the Horseshoe Cattle Company.

Thus, the fence line description in the cooperative agreement and the final project report is at variance with the description of the allotment in the licenses. In addition, a range line agreement, purportedly describing the Winnemucca Ranch allotment, executed by the appellants on May 16, 1967, and approved by the District Manager on June 23, 1967, (Ex. 9), makes reference to the Winnemucca Valley Fence but with obvious ambiguity goes on to describe by metes and bounds the boundary set out in the 1958 license.

These discrepancies have caused the controversy here. Appellants studied the Bureau of Land Management records and were assured by Bureau of Land Management personnel that the 1958 license described the Winnemucca allotment. Then on December 19, 1966, they took possession of the Ranch (Tr. 140). Thereafter, in May 1967, appellants signed a range line agreement as requested by the Bureau of Land Management. (Ex. 9). Upon receiving a copy of the cooperative agreement (Ex. 6), from the District Manager the following month, appellants learned that the division fence did not follow the line described in the 1958 license.

Appellants then made a formal request to have the fence moved (Ex. A), to conform to the boundary described in the 1958 license. In 1969 the District

Manager responded by letter explaining that the allotment description based on the fence line satisfies all the Class I demands attached to the properties abutting the boundary fence. (Ex. B).

At their hearing before the Judge, appellants contended that their predecessor in interest, Hill, entered into the 1958 Cooperative Agreement to construct the fence on representation that Intervenor would transfer to him 1,400 AUMs. (Ex. 3). Intervenor's application to transfer these privileges was denied on the grounds that the Home Ranch, on which the application was based, was not entitled to Class I privileges. The rejection was signed one day after Mr. Hill's death. [Ex. L]. Appellants alleged that intervenor knew it had no right to the 1,400 AUMs which it offered as consideration for the fence line agreement and therefore there was no consideration for the cooperative agreement rendering it void. (Tr. 167). In ruling on that point the Judge said:

> Assuming that Mr. Hill's reliance on the intervenor's representation was misplaced does not alter the fact that the fence as completed in 1959 established the boundary line for the two allotments. If intervenor, through the alleged wrongdoing, had acquired more than his entitlement, then that would be a matter for settlement between itself and the BLM.

In addition the Judge held that appellants are now precluded from questioning the motivating factors behind the cooperative agreement. The decision reasoned that the allotments were divided and agreed upon ten years ago and 43 CFR 4115.2-1(e)(13)(i)

sets a three year limitation on claims for reduction of licenses or permits of any applicant or intervenor with respect to qualifications of base property.

As to appellants' claim that the 1958 license sets out the boundary and therefore the fence should conform to that line, the decision below cites cases which hold that a grazing permittee has no right to any particular area of the federal range and since appellants are satisfied in their grazing use there is no basis for their complaint.

Appellants' final contention was that the present location of the fence does not comport with good range management practices because the fence has "pockets" where cattle gather and put pressure on the fence. The Judge's decision, based on testimony of intervenor and BLM personnel, held that appellants' point was not well taken; rather he found that the fence had been constructed along the more appropriate route. Also, if appellants' suggestions were to be followed, then appellants' grazing area would have to become a Class II grazing area and intervenor would be left short of forage to satisfy its Class I entitlement.

Appellants here assert basically the same points which they put forward below: First, that the original cooperative agreement is void for lack of consideration and is based on fraud; second, that the position of the range fence violates sound range management practices by causing policing problems.

In support of their first argument appellants list several facts. Intervenor, in consideration for plac-

ing the fence in its present location rather than along the original 1958 adjudication boundary, agreed to transfer grazing rights covering 1,400 AUM's to Hill. In May, 1957, 15 months before executing the agreement for construction of the fence, the Matleys had lost their appeal from an order denying them these identical privileges, an action which was final for this Department. *Matley Brothers, et al.,* A-27486 (May 28, 1957), dismissing the appeal of the decision of the Judge dated May 28, 1954. Nevertheless, the Matleys made application to transfer these non-existent privileges to Hill on August 18, 1958. [Exhibit 4]. The BLM did not reject that application until one day after Hill's death, November 14, 1961. [Exhibits 4 and L]. On the basis of this evidence, appellants label the agreement as fraudulent and cite general legal principles holding contracts induced by fraud to be voidable and, then cite cases to the effect that range agreements are contracts and, as such, are governed by general contract law. *Wayne M. and Mary B. Whitehill,* I.G.D. 486 (1947); *Mrs. Dulcie S. Williams,* I.G.D. 280 (1942)

On the second point, that of proper range management, appellants presented evidence of poor placement of the fence causing misuse due to improper relation between water and land resources. Appellants assert poor placement of the fence for the reason that the fence is on a downhill slope allowing cattle to break it more easily than if it were placed on level ground. Also, appellants allege that the Matleys placed salt near the fence causing the cattle to

break the fence to seek water on appellants' Horse Springs area. Alleging an improper relation between land and water resources, appellants point out that on the Matley's side of the fence there is no water, thus rendering it of little value for grazing. (Exhibit 7, Tr. 182). Therefore, appellants reason that it would be more in keeping with wise range management practices to return the area in dispute to them.

In answer to appellants, both the BLM and the M. S. Land and Livestock Company submitted briefs. Intervenor cites neither cases nor law, but only states its agreement with the Judge's decision and its opinion that if there were fraud involved appellants are "in the wrong ball park" and should go to a court of law.

The BLM, in its brief, restates the Judge's decision, elaborating on certain points and attacking several of appellants' arguments. Specifically, the BLM counters appellants' argument that the three-year statute of limitations set out in 43 CFR 4115.2-1(e)(13)(i) does not apply here because an "adjudication did not occur until 1967" as the term is defined in 43 CFR 4110.05(t). The BLM points out that the policy of the Department is that not only formal adjudications are covered by the three-year statute of limitation, but any type of allotment settlement. *W. Dalton La Rue, Sr., and Juanita S. La Rue,* A-30391 (March 16, 1966).

We agree with the Bureau of Land Management that the three-year statute of limitation as set out in 43 CFR 4115.2-1(e)(13)(i) is applicable to adjudica-

tions other than those defined in 43 CFR 4110.0-5(t). That is the exact holding in *Western States Cattle Company, Inc., et al.,* A-30572 (October 10, 1966) and is in keeping with the general policy that the three-year limit on adjudication of grazing allotments is defined as any "processing within the Department of applications, entries, claims, etc." *Malvin Pedroli, et al.,* 75 I.D. 63, 68 (1968).

Appellants assert, however, that the entire agreement upon which the fence is based was induced by fraud and is therefore void for lack of consideration. Thus, no time limitation is of any effect.

Concerning appellants' first point, we agree that range agreements are "to all intents and purposes" contracts, and thus must comply with general legal principles applicable to contracts. *Wayne M. and Mary B. Whitehill, supra; Mrs. Dulcie S. Williams, supra.* Moreover, there is no question that intervenor must have known at the time of the 1958 cooperative agreement that the consideration for that agreement, *i.e.,* 1,400 AUM's, were not intervenor's to transfer. Fifteen months before the fence cooperative agreement was signed the intervenor had lost any hope of being awarded the AUM's which it offered Hill. *Matley Brothers, et al., supra.* We also note that the former BLM Range Manager who signed both the cooperative agreement and the rejection of the transfer application should have known of the Department's decision holding that the intervenor had no right to the grazing privileges which it subsequently offered Hill.

Nevertheless, the question of fraud is not of controlling importance in this case. First, a federal grazing licensee has no right to any particular area of the federal range, 48 Stat. 1269 (1934) *as amended,* 43 U.S.C. §§ 315, 315(a)-315(r) (1970); *George C. West,* A-28862 (August 10, 1962). Also, as is pointed out by the government, a licensee's only reasonable basis for challenging his grazing allotment is to show the allotment to be incapable of satisfying the allottee's authorized grazing demand. *Thomas Ormachea and Michael P. Casey,* 73 I.D. 339 (1966); *Harold Babcock, et al.,* A-30301 (June 16, 1965). Appellants do not deny that their present allotment fully satisfies their demand under their Class I forage privileges. Moreover, while we agree with appellants that the three-year limit is of secondary importance in that the BLM has the right to exercise its discretionary power to modify existing allotments even after a licensee has lost his right to do so under 43 CFR 4115.2-1(e)(13)(i), we can find no basis in the evidence to do this. *Malvin Pedroli, et al., supra; Benny Lucero, Appellant, Restie Sandoval and Matias Garcia, Intervenors,* 8 IBLA 46 (1972). In addition to appellants' admission that they have a full allotment which fulfills their Class I privileges, a relocation of the fence to conform to the original line would cause appellants to gain 259 AUM's and intervenors to lose a corresponding number. This would require appellants to have the additional land licensed as Class II land which would necessitate common grazing between intervenor and appellants. [Tr. 51-52].

To allow common grazing would violate the original purpose of the fence which was to keep the drift between the ranches to a minimum. [Tr. 67]. The fence in question runs in part over appellants' private property. (Exhibit 10). The Judge suggested that the fence could be moved to the boundary of appellant's land and thus relieve any problems involved in its present position as concerns the appellants. The BLM had no objection to that suggestion. (Tr. 59).

The issue in this case is not how the fence came to be, but whether it should remain. The scope of examination to resolve this issue is limited to two questions. First, does the fence line serve as an appropriate boundary for the two allotments, affording each of the allottees full satisfaction of their base property qualifications? Second, does the location of the fence violate the tenets of proper range management to such a degree that relocation is required as a remedy? The preponderance of the evidence answers the first question in the affirmative, the second in the negative.

This department is seriously concerned by allegations of fraud associated with its apportionment of federal range land. Were it possible to conclude from he evidence in this case that a fraud had been perpetrated and, in consequence, the appellants had been deprived of a privilege to which they are entitled, this Board would act to set matters aright. But where it is established that the line is located so as to give both parties full satisfaction of their respective entitlements, as is the case here, the impetus for its

location is not germane to the question of whether it should be moved. In short, we will not destroy an equitable and just apportionment of federal range in favor of some less desirable division simply because of the dubious origins of the present line. If the fence had not been built and the events associated with its construction had not occurred, the evidence indicates that it would still have been necessary to relocate the old metes and bounds division line to the approximate position of the present fence line, as the previous division line afforded appellants forage in excess of their Class 1 qualifications.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/s/ Edward W. Stuebing
Edward W. Stuebing, Member

We concur:

/s/ Anne Poindexter Lewis
Anne Poindexter Lewis, Member

/s/ Joseph W. Goss
Joseph W. Goss, Member

In the United States District Court
for the District of Nevada

Civ. R-2827

W. Dalton La Rue, Sr., et al.,
Plaintiffs,
vs.
United States of America, et al.,
Defendants.

[Entered Mar. 13, 1974]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

From the preponderance of the evidence in this case this Court finds, concludes and decides

1. By a decision dated January 30, 1973, (*W. Dalton La Rue, Sr. and Juanita S. La Rue, d/b/a Winnemucca Ranch*, 9 IBLA 208), the Interior Board of Land Appeals, acting under the delegated authority of the Secretary of the Interior, affirmed a decision of an administrative law judge, dated October 28, 1971, sustaining the denial of the Plaintiffs' request that the Bureau of Land Management move a fence, sometimes referred to as the "Winnemucca Valley Division Fence", which separates the Winnemucca

Ranch grazing allotment from that of the Paiute Canyon Ranch in Nevada Grazing District No. 3.

2. The decision of the Interior Board of Land Appeals was based upon the Plaintiffs' petition for relocation of the "Winnemucca Valley Division Fence", the evidence developed at a hearing before the administrative law judge on September 1 and 10, 1970, and all briefs and arguments submitted.

3. The decision of the Interior Board of Land Appeals is not arbitrary or capricious.

4. The Interior Board of Land Appeals did not abuse its discretion by denying the Plaintiffs' relief.

Conclusions of Law

1. The action taken by the Interior Board of Land Appeals constitutes "agency action committed to agency discretion by law", i.e., by the Taylor Grazing Act, 43 U.S.C. § 315 et seq.

2. The Court has jurisdiction over the parties and over the subject matter to make a limited review of the ageney action for abuses of discretion and for errors of law.

3. There was no abuse of discretion by the Interior Board of Land Appeals. 5 U.S.C. § 706(2)(A).

4. The agency did not act arbitrarily or capriciously in rendering its decision. 5 U.S.C. § 706(2)(A).

5. The Interior Board of Land Appeals did not commit any errors of law. 5 U.S.C. § 706.

6. Plaintiffs' second cause of action for monetary damages, as it appears in the amended complaint, fails to state a claim upon which relief can be granted by reason of 28 U.S.C. § 2680(h) which bars claims for the tort of misrepresentation from being brought against the United States of America.

7. Plaintiffs' second cause of action for monetary damages, as it appears in the amended complaint, fails to state a claim upon which relief can be granted against any individual federal officer named in the complaint.

Dated this 8th day of March, 1974.

/s/ John C. Bowen
John C. Bowen
United States District Judge

In the United States District Court
for the District of Nevada

Civ. R-2827

W. Dalton La Rue, Sr., et al.,
Plaintiffs,
vs.
United States of America, et al.,
Defendants.

[Entered Mar. 13, 1974]

JUDGMENT

This matter having come on for hearing on Defendants' Motion for Summary Judgment, and the Court having heard oral argument and considered the pleadings and all material filed in support thereof,

It Is Ordered And Adjudged as follows:

1. Defendants' Motion for Summary Judgment is granted.

2. The action is dismissed and Plaintiff takes nothing.

Dated this 8th day of March, 1974.

/s/ John C. Bowen
John C. Bowen
United States District Judge

Do Not Publish

United States Court of Appeals
for the Ninth Circuit

No. 74-2048

W. Dalton La Rue, Sr., and
Juanita S. La Rue,
Plaintiffs-Appellants,

vs.

United States of America, Rogers C. B. Morton, Secretary of Interior, E. I. Rowland, State Director of Bureau of Land Management, and Marshall Matley, Clifford Matley, John Matley and Wayne Matley, d.b.a. M. S. Land & Livestock Co., a Co-Partnership,
Defendants-Appellees.

[March 2, 1976]

Appeal from the United States District Court
for the District of Nevada

MEMORANDUM

Before: BROWNING and KENNEDY, Circuit Judges, and SWEIGERT,* District Judge.

The Bureau of Land Management allotted certain grazing rights on federal lands to the appellants. One

*Honorable William T. Sweigert, United States District Judge, District of Central California, sitting by designation.

boundary of the allotment coincided with a fence built by an agreement between appellants' predecessors in interest and neighboring landowners, the Matleys.

Appellants claimed the agreement was procured by the Matleys' fraud, so that the fence line should be relocated, and the boundaries for their grazing rights similarly extended. The Bureau of Land Management declined to set aside its earlier determination of the grazing rights, and the Interior Board of Land Appeals upheld the decision of the agency. Appellants sought relief in the district court, and the Matleys intervened. Summary judgment was granted for the agency. We affirm.

The location of the fence line is not relevant to the agency's determination of grazing allotments for the appellants or for the Matleys. Any action of the landowners or their predecessors in interest affixing fence lines on federal lands need not be considered by the Bureau in making its independent determination of adequate grazing allotments for each rancher. Further, grazing allotments are not considered vested rights. 43 U.S.C. § 315b; Acton v. United States, 401 F.2d 896, 899 (9th Cir. 1968) (dictum), *cert. denied*, 393 U.S. 1121 (1969). The Bureau of Land Management has continuing discretion in allocating grazing rights or in changing them from time to time, and there was no abuse of this discretion here.

Appellants' cause of action against the United States for damages was based on alleged misrepresentation and is barred by the provision of 28 U.S.C. § 2680(h).

Accordingly, the judgment of the lower court is affirmed.

United States Court of Appeals
for the Ninth Circuit

No. 74-2048

W. Dalton La Rue, Sr. and
Juanita S. La Rue,
Plaintiffs-Appellants,

vs.

United States of America, Rogers C. B. Morton, Secretary of Interior, E. I. Rowland, State Director of Bureau of Land Management, and Marshall Matley, Clifford Matley, John Matley and Wayne Matley, d.b.a. M. S. Land & Livestock Co., a Co-Partnership,
Defendants-Appellees.

[Filed Apr. 21, 1976]

Appeal from the United States District Court
for the District of Nevada

ORDER

Before: BROWNING and KENNEDY, Circuit Judges, and *SWEIGERT, District Judge.

Appellants' petition for rehearing is DENIED.

*Honorable William T. Sweigert, United States District Judge, District of Central California, sitting by designation.

Supreme Court, U. S.
FILED
AUG 12 1976
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1976

* * * *

W. DALTON LA RUE, SR., and
JUANITA S. LA RUE,

Petitioners,

vs. No. 76-53

UNITED STATES OF AMERICA, ROGERS C. B. MORTON, Secretary of Interior, E. I. ROWLAND, State Director of Bureau of Land Management, and MARSHALL MATLEY, CLIFFORD MATLEY, JOHN MATLEY and WAYNE MATLEY, d.b.a. M. S. LAND & LIVESTOCK CO., a Co-Partnership,

Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

* * * *

BRIAN L. HALL
290 South Arlington Avenue
Reno, Nevada 89505
Attorney for Respondents, MARSHALL MATLEY, CLIFFORD MATLEY, JOHN MATLEY and WAYNE MATLEY, d.b.a. M. S. LAND & LIVESTOCK CO., a Co-Partnership

SUPREME COURT OF THE UNITED STATES

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_____/

REPLY TO PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

* * * *

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REPLY TO PETITION FOR

WRIT OF CERTIORARI

As petitioners set forth, this is a petition for a review of a decision of the Ninth Circuit Court of Appeals affirming the District Court's Judgment granting respondents' motion for summary judgment and dismissing petitioners' action.

Petitioners have devoted most of their petition to the proposition that MARSHALL MATLEY, CLIFFORD MATLEY, JOHN MATLEY and WAYNE MATLEY, d.b.a. M & S LAND AND LIVESTOCK COMPANY, a co-partnership, hereinafter for the purpose of simplicity simply referred to as MATLEYS, perpetrated a fraud on a prior owner of property now owned by petitioners; and, by reason of this fraud, a stock fence dividing certain government land should be relocated.

The issue on the motion for summary

judgment before the District Court was not whether or not there was fraud perpetrated by MATLEYS on petitioners' predecessor; the issue was whether or not the Interior Board of Land Appeals, hereafter referred to as IBLA, in rendering its decision, committed any errors of law, acted arbitrarily or capriciously, or abused its discretion. The District Court held that the action taken by the IBLA constitutes agency action committed to agency discretion by law, there was no abuse of discretion by the IBLA, the agency did not act arbitrarily or capriciously, nor did the agency commit any errors of law. See the Findings of Fact and Conclusions of Law and Judgment at p. xxxvi of petitioners' Appendix.

Petitioners are requesting the Supreme Court, as they requested the Court of Appeals to do, and as they requested the District Court to do, to

substitute its judgment for that of the IBLA and, first of all, make a finding that there was fraud and, second, that by reason of the fraud, the fence in question in this matter ought to be moved.

Commencing at page 5 of petitioners' brief, are five reasons for granting the Writ of Certiorari. First, and probably of utmost importance, is that there is not one case cited upholding petitioners' argument that, under the facts of this case, the Writ should be granted. Petitioners' Nos. 1, 2 and 3 all, basically, are founded upon the so-called fraud issue. With respect to these contentions of fraud, the IBLA thoroughly considered the issue of fraud in light of the evidence it had before it, and concluded as follows:

> "Nevertheless, the question of fraud is not of controlling importance in this case. First, a federal grazing licensee has no right to any particular area of the federal range, 48 Stat. 1269 (1934) as amended, 43 U.S.C. §§ 315, 315(a)-315(r) (1970);

> George C. West, A28862 (August 10, 1962). Also, as is pointed out by the government, a licensee's only reasonable basis for challenging his grazing allotment is to show the allotment to be incapable of satisfying the allottee's authorized grazing demand. . . .
>
> "The issue in this case is not how the fence came to be, but whether it should remain. The scope of examination to resolve this issue is limited to two questions. First, does the fence line serve as an appropriate boundary for the two allotments, affording each of the allottees full satisfaction of their base property qualifications? Second, does the location of the fence violate the tenets of proper range management to such a degree that relocation is required as a remedy? The preponderance of the evidence answers the first question in the affirmative, the second in the negative.
>
> "This department is seriously concerned by allegations of fraud associated with its apportionment of federal range land. Were it possible to conclude from the evidence in this case that a fraud had been perpetrated and, in consequence the appellants had been deprived of a privilege to which they are entitled, this Board would act to set matters aright. But where it is established that the line is located so as to give both parties full satisfaction of their respective allotments, as is the case here, the impetus for its location is not germane to the ques-

> tion of whether it should be moved. In short, we will not destroy an equitable and just apportionment of federal range in favor of some less desirable division simply because of the dubious origins of the present line." P. xxxiii, et al, of petitioners' Appendix.

From the foregoing, the District Court concluded that petitioners' main issue had been completely and properly considered and resolved by the IBLA, and therefore dismissed petitioners' action.

With respect to petitioners' No. 4, petitioners' position is set forth at page 40 of their brief, and is as follows:

> "A licensee must know what he owns and what are his rights when he is adjudicated a specific grazing allotment, as Appellants were in the present case."

The law is clear that the petitioners do not have a property right, as they think they do, to grazing land. A grazing permit does not create a property right, it confers no more than a mere privilege to graze livestock, which can be withdrawn by the United States without payment or

compensation. Bowman v. Udall, (D.C. D.C. 1965) 243 F.Supp. 672, affirmed 364 F2d 676, 124 U.S. App.D.C. 283; Acton v. U.S., (C.A. Ariz. 1968) 401 F.2d 896, certiorari denied 89 S.Ct. 1003, 393 U.S. 1121, 22 L.Ed.2d 128.

No. 5 of petitioners' brief is not directed at intervenors and no response will be made.

There is substantial law respecting the issues involved in this case. In Henrikson v. Udall, 350 F.2d 949-50 (9th Cir. 1965), the Court held:

> "It is the function of neither this Court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed." (Underscoring added.)

The Court held in Dredge Corporation v. Penny, 338 F.2d 456, 462 (9th Cir. 1964):

> "In such a proceeding the plaintiff

> is not entitled to a de novo hearing in the district court. (Citation omitted.) The only function the district court has with regard to the facts in such a procedure, if the question is raised, is to determine whether the administrative findings of fact are supported by substantial evidence on the record as a whole."

There are numerous other cases at 5 U.S.C.A. § 706 n.155-160.

Respondents, at the risk of being redundant, again point out to the Court that the only dispute the petitioners have is with the conclusion reached by the IBLA. Petitioners believe the IBLA should have found fraud on the part of respondents MATLEYS, and by reason of this fraud, the fence in question ought to be moved. As is set forth above, the IBLA considered the fraud issue and found there was none, but it even went further and held even if there were a fraud, that would not be sufficient reason to move the fence. Under these facts the petitioners received their limited right of judicial

review, and upon such review, based upon the record, their action was dismissed.

As is set forth in Rule 19 of the Supreme Court Rules, "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Thereafter the rule sets forth guidelines indicating the character of reasons which will be considered by the Court in granting a writ. Petitioners have not specifically claimed to fit in any of the categories set forth in the rule, and from a review of their brief, it is also impossible, even in a general way, to see where they come within any of the guidelines.

Numerous cases are cited in 28 U.S.C.A. § 1254. Respondents have not found any case for authority for granting petitioners' writ, and since petitioners cited

no authority, apparently they were unable to find any.

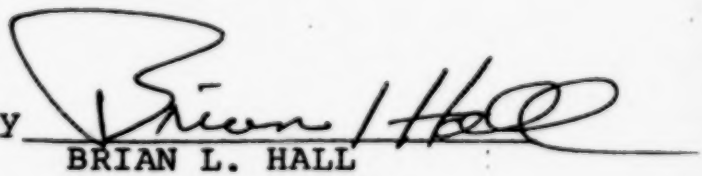
It is stated in 28 U.S.C.A. § 1254, Note 43, page 66, as follows:

> "Jurisdiction to review by certiorari should be sparingly exercised, and only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, or to secure uniformity of decisions." (Citing cases.)

In conclusion, it is respectfully submitted that petitioners have not met their burden respecting the granting of a Writ of Certiorari, and the Court should therefore deny the Writ.

DATED: August 9th, 1976.

BARRY & HALL

By 

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Supreme Court, U.S.
FILED
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No. 76-53

In the Supreme Court of the United States

OCTOBER TERM, 1976

W. DALTON LA RUE, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

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W. DALTON LA RUE, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. xl-xli) and the district court (Pet. App. xxxvi-xxxviii) are not officially reported. The opinion of the Interior Board of Land Appeals (Pet. App. xxiii-xxxv) is reported at 9 IBLA 208.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1976, and a timely petition for rehearing was denied on April 21, 1976. The petition for a writ of certiorari was filed on July 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly affirmed the Interior Board of Land Appeals' decision that a stock

fence separating federal grazing allotments should not be relocated because its present location allows full satisfaction of petitioners' grazing entitlement.

2. Whether the court of appeals correctly declined to consider petitioners' claim, raised for the first time on appeal, that officials of the Bureau of Land Management aided and abetted a violation of 18 U.S.C. 1001 allegedly committed by petitioners' neighbors.

3. Whether the courts below correctly dismissed petitioners' claim against the United States for damages allegedly resulting from their reliance upon erroneous information supplied by employees of the Bureau of Land Management.

STATEMENT

Petitioners and the intervenor-respondents (the Matleys) own neighboring ranches in Winnemucca Valley, Nevada (Pet. App. xiii). Both ranches are "base properties" qualified for Class 1 grazing privileges on the federal range under the Taylor Grazing Act, 48 Stat. 1269, as amended, 43 U.S.C. 315 *et seq.* (*ibid.*).[1] On

[1]"Base property" is defined as "property used for the support of the livestock for which a grazing privilege is sought and on the basis of which the extent of a license or permit is computed." 43 C.F.R. 4110.0-5(j).

"Class 1" grazing privileges are granted in recognition of "land dependent by use," defined as "forage land other than Federal range of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it and which, in the 'priority period' [5-year period immediately preceding June 28, 1934, or immediately preceding the date of the order adding land to a grazing district], was used as a part of an established, permanent, and continuing livestock operation for any two consecutive years or for any three years of such priority period in connection with substantially the same part of the public domain." 43 C.F.R. 4110.0-5(m)(1), 4111.2-1(b).

August 28, 1958, petitioners' predecessor in interest, Elmor Hill, entered into a cooperative agreement with the Matleys under Section 4 of the Taylor Grazing Act, 43 U.S.C. 315c, for the construction of a stock fence separating their grazing allotments (Pet. App. xiii-xiv). The fence was completed in May 1959 and accepted by the Matleys, Hill, and the Bureau of Land Management (BLM) as the boundary line between the two grazing allotments (Pet. App. xiv). The BLM failed to update its records, however, and continued to issue grazing licenses that contained metes and bounds descriptions of petitioners' allotment at variance with the actual fence line (Pet. App. xv-xvi).

When petitioners discovered the discrepancy, they asked BLM to require removal of the fence to the boundary described in the grazing licenses, approximately one mile to the east of the actual fence line. By a decision dated December 24, 1969, the BLM district manager reaffirmed that the fence line, as presently located, comprised the east boundary of petitioners' allotment, finding (a) that the fenced allotment fully satisfied petitioners' Class 1 base property qualifications and (b) that acceptance of the fence as the eastern boundary line by petitioners' predecessors barred readjudication under Department regulations (Pet. App. vi-vii).[2]

[2]43 C.F.R. 4115.2-1(e)(13)(i) provides:

> No readjudication of any license or permit * * * will be made on the claim of any applicant or intervenor with respect to the qualifications of the base property, or as to the livestock numbers or seasons of use of the Federal range allotment where such qualifications or such allotment has been recognized and license or permit has issued for a period of three consecutive years or more, immediately preceding such claim.

Petitioners appealed the district manager's decision, contending that the location of the fence was induced by the Matleys' fraud upon petitioners' predecessor. The district manager's decision was affirmed both by a hearing examiner (Pet. App. viii-xxii) and by the Interior Board of Land Appeals (Pet. App. xxiii-xxxv).[3] The hearing examiner and the IBLA agreed that the erroneous boundary description contained in petitioners' grazing license afforded no basis for relief because petitioners' allotment, as now fenced, provides sufficient forage to satisfy their authorized grazing use, a fact that petitioners have never disputed. As to petitioners' allegation of fraud, the IBLA stated (Pet. App. xxxiv-xxxv):

> This department is seriously concerned by allegations of fraud associated with its apportionment of federal range land. Were it possible to conclude from the evidence in this case that a fraud had been perpetrated and, in consequence, the appellants had been deprived of a privilege to which they are entitled, this Board would act to set matters aright. But where it is established that the line is located so as to give both parties full satisfaction of their respective entitlements, as is the case here, the impetus for its location is not germane to the question of whether it should be moved. In short, we will not destroy an equitable and just apportionment of federal range in

[3]The authority of the Secretary of the Interior to act upon appeals from subordinate departmental officials relating to the use and disposition of public lands and their resources is delegated to the Interior Board of Land Appeals by Regulation 43 C.F.R. 4.1(3). Thus, a final decision by the IBLA constitutes the final agency action in a matter.

Throughout this brief "secretary" and "IBLA" are used interchangeably in referring to action taken by the IBLA.

> favor of some less desirable division simply because of the dubious origins of the present line. If the fence had not been built and the events associated with its construction had not occurred, the evidence indicates that it would still have been necessary to relocate the old metes and bounds division line to the approximate position of the present fence line, as the previous division line afforded appellants forage in excess of their Class I qualifications.

Petitioners then instituted this action to review the decision of the IBLA.[4] The district court granted the defendants' motion for summary judgment, holding that the IBLA decision was not arbitrary or capricious. The court of appeals, in a *per curiam* memorandum, affirmed.

ARGUMENT

The court of appeals' decision is correct, does not conflict with the decision of any other court of appeals, and does not present questions warranting review by this Court.

1. The IBLA's decision rests on two well-established principles embodied in the Taylor Grazing Act. First, a grazing licensee has no legal right to any particular area of the federal range, 43 U.S.C. 315b; the only basis upon which an allotment of federal range lands may

[4]The district court apparently concluded that the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, conferred jurisdiction over this case (Pet. App. xxxvii). For the reasons stated in our brief in *Mathews* v. *Sanders*, No. 75-1443, we do not believe that the Administrative Procedure Act contains an independent grant of jurisdiction. Moreover, even if jurisdiction under the Act were generally recognized, this case, as the district court found (Pet. App. xxxvii), involves "agency action committed to agency discretion by law." Review of such action is specifically precluded by the Administrative Procedure Act, 5 U.S.C. 701(a)(2).

be challenged is that it is incapable of satisfying the allottee's authorized grazing use. *Thomas Ormachea and Michael P. Casey*, 73 I.D. 339; *Harold Babcock, et al.*, A-30301 (June 16, 1965) (unpublished), affirmed *sub nom. Babcock, et al.* v. *Udall*, Civil No. 1-66-87 (S. D. Idaho, 1969). Second, a grazing licensee or permittee may not seek to readjudicate his license or permit, with respect to base property qualifications, livestock numbers, or seasons of use, when such qualifications or allotment have been recognized by the issuance of a license or permit for three consecutive years or more. 43 C.F.R. 4115.2-1 (e)(13)(i); *Malvin Pedroli, et al.*, 75 I.D. 63.

Petitioners do not, indeed could not, dispute that their allotment as presently recognized by the BLM contains sufficient forage to satisfy their Class 1 base property qualifications. Moreover, the existing fence for many years was recognized as the dividing line between the two allotments. Thus, the IBLA correctly concluded that petitioners were barred on two grounds from asserting a claim of right to additional grazing privileges that would be gained from movement of the fence.[5]

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[5]The outcome of this case does not depend, therefore, on petitioners' contention (Pet. 37-40) that the ban against readjudications is inapplicable because there was no formal adjudication of the fence line. Only the district manager and the hearing examiner placed reliance on 43 C.F.R. 4115.2-1(e)(13)(i) and then only as an alternative ground of decision. Each found that, apart from the readjudication problem, there was no basis for relocating the fence because petitioners already enjoyed all the grazing privileges to which they are entitled. The IBLA, which rendered the final administrative decision, agreed with petitioners that "the three-year limit is of secondary importance in that the BLM has the right to exercise its discretionary power to modify existing allotments even after a licensee has lost his right to do so * * *" (Pet. App. xxxiii). The IBLA concluded, however, that there was no reason for BLM to exercise its discretionary authority since petitioners had not been injured. Thus, despite the references to 43 C.F.R. 4115.2-1(e)(13)(i), it is clear that petitioners were not denied relief solely because of the statute of limitations but rather because, after full consideration on the merits, the IBLA found that they were not entitled to additional grazing privileges.

Petitioners' allegation of fraud, as the IBLA held, does not require disregard of these principles.[6] Injury is an essential element of remediable fraud, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254; and fraud without damage is not actionable, *Commodity Credit Corp.* v. *Rosenberg Bros. & Co.*, 243 F. 2d 504, 512 (C.A. 9). Here petitioners' predecessor yielded no grazing privileges to which he would otherwise have been entitled and the Matleys obtained no additional grazing privileges. Indeed, petitioners apparently concede that their allotment, as presently fenced, fully satisfies their Class 1 grazing entitlement. Thus, the IBLA's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

2. Petitioners' contention that the BLM district manager and the Matleys violated 18 U.S.C. 2 and 1001, respectively, was not raised in the district court and was not considered by the court of appeals. *Katsev* v. *Coleman*, 530 F. 2d 176 (C.A. 8); *Michael-Regan Co., Inc.* v. *Lindell*, 527 F. 2d 653 (C.A. 9); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826 (C.A. 5). In any event, mere allegations about criminal behavior do not alter the critical fact, discussed above, that petitioners already have all the Class 1 forage to which they are entitled.

3. In their amended complaint, petitioners added a second cause of action for damages against the United States. The amended complaint alleged that petitioners

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[6]Although they do not discuss the issue in their petition, petitioners suggest in Question 5 (Pet. 3) that the lower courts erred in denying them a trial *de novo*. The Administrative Procedure Act does not permit a trial *de novo* of administrative decisions of the type involved here. See, *e.g.*, *United States* v. *Consolidated Mines & Smelting Co., Ltd.*, 455 F. 2d 432 (C.A. 9); *Coleman* v. *United States*, 363 F. 2d 190 (C.A. 9), reversed on other grounds, 390 U.S. 599; *Adams* v. *United States*, 318 F. 2d 861 (C.A. 9); *Dredge Corp.* v. *Penny*, 338 F. 2d 456, 462 (C.A. 9); *Henrikson* v. *Udall*, 350 F. 2d 949, 950 (C.A. 9).

had been injured by their reliance upon erroneous information supplied by employees of the BLM. The courts below correctly held, however, that the claim was barred by 28 U.S.C. 2680(h), which exempts claims for the tort of misrepresentation from coverage under the Federal Tort Claims Act.[7] The gravemen of the complaint here is that employees of the BLM supplied "incorrect information," on which petitioners relied to their detriment. This cause of action falls within the misrepresentation exception of Section 2680(h).[8] See, *e.g.*, *United States* v. *Nuestadt*, 366 U.S. 696; *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10).

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[7]Although the courts below did not address this issue, we believe petitioners' failure to file an administrative claim, as required by 28 U.S.C. 2675(a), is a jurisdictional defect which cannot be waived. See *Best Bearings Co.* v. *United States*, 463 F. 2d 1177, 1179 (C.A. 7); *Peterson* v. *United States*, 428 F. 2d 368 (C.A. 8); *Meeker* v. *United States*, 435 F. 2d 1219 (C.A. 8). Petitioners' failure to file an administrative claim means that their cause of action is barred by the statute of limitations. 28 U.S.C. 2401(b).

[8]Petitioners attempt to avoid the barrier of Section 2680(h) by alleging that the BLM, in addition to making misrepresentations, negligently performed "other tasks and duties," citing *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379, 398 (C.A. 9). In *United Airlines* the court held that an action based upon the failure of a government employee to advise properly an airplane pilot about air traffic conditions was not barred by Section 2680(h), since, in addition to the misrepresentation involved, the government was also guilty of negligent performance of "operational tasks." Petitioners' complaint in this case, however, is not comparable to the unique situations presented by the flight information cases. See *Matthews* v. *United States*, 456 F. 2d 395, 398 (C.A. 5); *Ingham* v. *Eastern Air Lines, Inc.*, 373 F. 2d 227, 239 (C.A. 2).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-53

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and

JUANITA S. LA RUE,

Petitioners,

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PETITIONER'S RESPONSE TO REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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ARGUMENT

First it should be pointed out that Respondents Matleys' brief should not be accepted by the Court

for the reason that it does not comply with Supreme Court Rule 39. Rule 39 states that all briefs must be printed, which Respondents' brief is not. Further, briefs are supposed to be 6⅛ by 9¼ inches, which Respondents' brief is not.

In opposition to Respondents Matleys' brief, Petitioners' position, as set out in detail in their opening brief, is that the IBLA decision was arbitrary, capricious, not supported by substantial evidence, in error as to matters of law, and unwarranted by facts.

Generally, the essential facts of this case are not in dispute and this Court will not have to reverse the IBLA on the latter's findings of fact in order to reverse the IBLA in the conclusions reached.

Regarding the issue of fraud, Respondents Matleys refer to the IBLA decision and argue that it is clear from the IBLA decision that ". . . the IBLA thoroughly considered the issue of fraud in light of evidence before it . . ." Yet the Respondents Matleys fail to explain the following excerpts from the IBLA:

> "But where it is established that the line is located so as to give both parties full satisfaction of their respective entitlements, as is the case here, the *impetus for its location is not germane to the question of whether it should be moved.*
>
> Nevertheless, the question of fraud is not of controlling importance in this case . . . Also, a licensee's only reasonable basis for challenging his grazing allotment is to show the allotment to be incapable of satisfying the allottee's authorized grazing demand . . ." (Emphasis added).

In the quote above, the IBLA held in effect that fraud by one licensee upon another is not a reasonable basis for challenging a grazing allotment. Certainly, such a holding is arbitrary and capricious.

Respondents Matleys argue that Petitioners do not cite any cases why, under the facts of this case, the Writ should be granted. Clearly, as is argued in Petitioners' opening brief, the commission of a fraud cannot be tolerated. No other principle of law can take precedence over the body of law which protects a defrauded person.

Respondents Matleys next argue that the facts in this case do not establish a fraud. Petitioners argue this point at length in their opening brief and ask this Court to carefully consider the facts, for the facts clearly establish an intentional wrongdoing by one party upon another.

Next Respondents argue that this case does not fit into any of the categories of cases where a Writ shall be granted. Respondents cite Rule 19 of the Supreme Court Rules as controlling. Respondents apparently failed to read that portion of Rule 19 which states as follows:

> ". . . The following, *while neither controlling nor fully measuring the Court's discretion,* indicate the character of the reasons which will be considered . . ." (Emphasis added).

As Petitioners argued in their Opening Brief, the principles established by the lower Court in this case of allowing a person to gain by a fraudulent act, and

of allowing a fraud to go unanswered are too contrary to established principles of law which forbid a fraudulent act from being rewarded.

However, even avoiding the guidelines set forth in Rule 19, this case is one which should receive review by the Supreme Court.

Finally, it should be pointed out that Respondents Matleys do not answer the other issues raised by Respondents. For example, Respondents Matleys have never answered the issue of the violation of 18 USC 1001 by Marshall Matley. It must only be assumed that Respondents have not answered the charge because they have no answer. Marshall Matley knowingly put incorrect information on the Application for Transfer of Grazing Rights and then swore to the truth of that statement.

Petitioners would like to express their concern over the fact that none of the Respondents have answered the charge of violation of 18 USC 1001 and 18 USC 2. Further, *none of the lower courts have dealt with that issue* but have ignored it. Petitioner W. Dalton La Rue is an enrolled agent of the Internal Revenue Service and is cognizant of the elements of fraud as has been determined by this Court in earlier decisions. As a result, Petitioners hope that this Court does not ignore the issue of fraud that is obvious in this case.

The other Respondents, United States of America, Rogers C. B. Morton, and E. I. Rowland have not yet filed their reply and the time within which to file their brief expired some time ago. Petitioners feel

that if a brief is filed by said Respondents at this late date, that it should not be considered by this Court. The United States is granted 15 days additional time to file responding briefs and there is no excuse or reason why the United States should be permitted to file a brief weeks after it is due when other parties are either required to comply with the time allowed, or get an Order extending time. Petitioners would object to any brief being filed at this date by the United States as a fugitive document.

In conclusion, Petitioners ask that their Petition be granted.

Respectfully submitted,

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September 27, 1976.